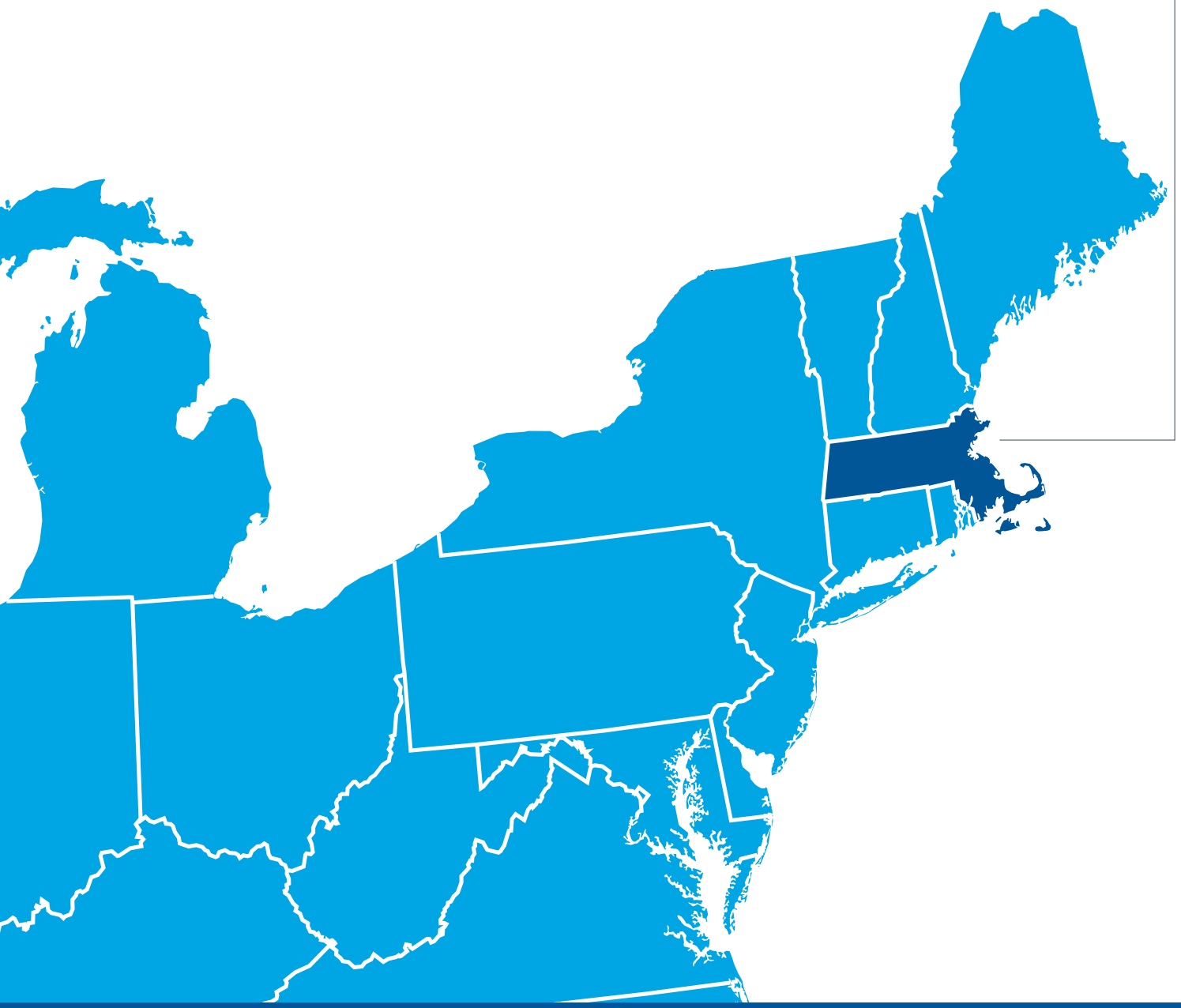
SEYFARTH SHAW

Mass-Peculiarities:

2017 | AN EMPLOYER'S GUIDE TO WAGE & HOUR LAW IN THE BAY STATE



3RD EDITION Authored by the Wage & Hour Litigation Practice Group | Seyfarth Shaw LLP, Boston Office

SEYFARTH SHAW

MASSACHUSETTS PECULIARITIES

An Employer's Guide to Wage & Hour Law in the Bay State

Third Edition

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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. Included in these laws are, for example, the so-called "Blue Laws," an antiquated and convoluted set of restrictions dating back to colonial days; minimum wage and overtime law that differs in important respects from federal law; possibly the most complex and harsh tip statute in the country; and a more narrowly defined constriction in the use of independent contractors than under federal and other state laws.

The protections for employees and obligations on employers continue to increase. Since the second edition of this publication, Massachusetts has raised its minimum wage to one of the highest in the country; enacted an equal pay law that exceeds the requirements of federal law; extended parental leave to include paternity leave; and passed a sick leave law generous to employees.

Compounding the risks of non-compliance with these laws is the Commonwealth's statute mandating liquidated treble damages for wage and hour violations, which allows no defense to the trebling of damages after a liability finding. Understanding the legal landscape in Massachusetts is a business necessity; in the context of a class action lawsuit, even an inadvertent violation could provide a windfall recovery to employees at catastrophic expense to an employer.

This publication provides a comprehensive summary of Massachusetts wage and hour laws, including an analysis of the significant court decisions and regulatory authorities interpreting those laws and, where applicable, the ways in which they differ from federal law. In so doing, it is our goal to assist in-house counsel and human resources professionals in identifying policies and practices that may expose their Massachusetts business to risks that may be significantly reduced or avoided altogether.

This third edition incorporates thoughts and comments we have received on prior editions.[1] As always, we welcome your suggestions for our next edition, as we strive to provide the most user-friendly, helpful guide to the business community on these complex laws.

[1] The Wage & Hour Practice Group would like to thank Karen Carr for her assistance in preparing this edition of the publication.

I. HOURS OF WORK

A. The Workweek

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.[2] Once an employee's workweek is established it remains fixed regardless of the schedule worked by the employee. Any change to the workweek is permitted only when the change is meant to be permanent and is not undertaken to evade overtime payments.[3]

B. Sunday and Holiday Work

The laws in Massachusetts governing work on Sunday and holidays, commonly referred to as the "Blue Laws," are set forth in a complex statutory framework that can be difficult to interpret and that causes much confusion among employers. Although initially very restrictive, the Blue Laws now include many exceptions to the prohibition of Sunday work.

1. Default "Closure Rule"

Often employers believe that the Blue Laws mandate a premium pay requirement and the only issue to resolve is whether the employer's business falls under that requirement (i.e., time-and-one-half pay). Instead, the Blue Laws are in essence business closure laws, and the first issue that an employer must address is whether it is *allowed to operate* on Sunday. Understanding the original purpose of the Blue Laws may resolve some of the confusion regarding this issue.

The Blue Laws originated in the late 17th century to *restrict* all Sunday activities. Over time, some of the Massachusetts restrictions on Sunday activity eased (for example, it became legal to operate an ice cream parlor on Sunday in 1902, to engage in unpaid gardening in one's yard in 1930, and to dance at a Sunday wedding in 1955), but Massachusetts maintains a broad prohibition against operating a business on Sundays and certain holidays, which, to many, seems out of sync with the modern world. Even today, the default rule imposed in Massachusetts states that "[w]hoever on Sunday keeps open his shop, warehouse, factory or other place of business, or sells foodstuffs, goods, wares, merchandise or real estate, or does any manner of labor, business or work, except works of necessity and charity" is in violation of the Blue Laws.[4]

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[2] *See* Massachusetts Department of Labor Standards (DLS) (formerly known as Massachusetts Department of Labor, Division of Occupational Safety) Opinion Letter MW-2008-005 (July 21, 2008) (looking to definition of "workweek" under federal Fair Labor Standards Act (FLSA)). Note that employees working for the same employer, even with the same or similar job titles, may have different workweeks. Thus, formally establishing each employee's workweek is most important since this determines (1) whether each employee has been compensated at no less than minimum wage; and (2) when the employer owes individual employees overtime. These two issues are addressed in Sections IV and V.

[3] 29 C.F.R. § 778.105.

[4] M.G.L. ch. 136, § 5.

2. Exemptions

Over the last century, the Commonwealth gradually has narrowed these prohibitions by enacting numerous piecemeal exemptions to the Blue Laws, and there are now fifty-five exemptions, listed in Massachusetts General Laws Chapter 136, Section 6, that allow certain businesses to operate legally on Sunday. The first question that an employer therefore must ask is whether it falls within one of the following exemptions.

- "Any manner of labor, business or work not performed for material compensation"
- The operation of a bank
- Repairs to public roads and bridges, and the collection of tolls
- Any public service that is necessary for the continuation of life, such as the operation of municipal water and sewage disposal systems, hospitals, and clinics
- "[E]mergency repairs for the purposes of immediate and necessary protection of persons, or property"
- "The manufacture, sale or distribution of steam, electricity, fuel, gas, oxygen, hydrogen, nitrogen, acetylene, carbon dioxide and the calcining of lime, manufacturing processes which for technical reasons require continuous operation, and the processing of checks, items, documents or data by a bank or trust company"
- The operation of radio and television stations, and the preparation, printing, publication, sale, and delivery of newspapers
- The operation of any secular place of business operated by a person who observes the Sabbath on Saturday
- "The showing, sale, or rental of noncommercial real property to be used for residential purposes"
- The operation of libraries and art galleries
- The operation of boats for recreation and non-commercial fishing, and the sale of bait for fishing
- Catching seafood not otherwise prohibited by law
- The operation of an automotive service facility, including the retail sale of gasoline
- Cultivating, raising, and harvesting agricultural products and fruit, and making butter and cheese

- The transport or delivery of goods in commerce, or for consideration, by motor truck or trailer or other means, and the performance of all activities incidental thereto, including the operation of all facilities and warehousing, necessary to prepare, stage, and effect such transport or delivery; or the loading or unloading of same and the performance of labor, business, and work directly or indirectly related thereto[5]

- The transport of persons by "licensed carriers"

- The "transport or processing of fresh meat, fresh poultry, fresh fish, fresh seafoods, fresh dairy products, fresh bakery products, fresh fruits or fresh vegetables, or ice, bees, or Irish moss, when circumstances require that such work be done on Sunday"

- The transport of livestock and farming equipment for participation in fairs, expositions, or sporting events

- The operation of inns, hotels, and restaurants

- Work incidental to a religious exercise

- The operation of a coin-operated self-service laundry or car wash

- The operation of a self-service auto repair center

- The operation of drivers' education schools

- "The cutting and styling of hair, manicuring, and the furnishing of related cosmetological and beauty services"

- Making and baking of bakery products, and the selling of same in a shop or store

- The operation of a store or shop that sells food provided that "not more than a total of three persons, including the proprietor, are employed therein at any one time on Sunday and throughout the week"

- "The retail sale of alcoholic beverages not to be drunk on the premises on Sundays" by licensed retail establishments

- The rental, sale, and operation of equipment and vehicles for pleasure and entertainment

[5] This provision was amended effective August 10, 2016, by *An Act Relative to Job Creation and Workforce Development*, Chapter 219 of the Acts of 2016. Previously, the exemption was limited to "the transport of goods in commerce" and did not extend to "incidental" activities.

- "The sale and rental of sporting equipment and clothing on premises where the sport for which the equipment or clothing to be sold or rented is carried on"
- "The retail sale of tires, batteries and automotive parts for emergency use"
- The retail sale "of growing plants, trees or bushes, and articles incidental to the cultivation of" the same, and the retail sale and delivery of cut flowers
- "The sale, for consumption off the premises, of food prepared by a common victualler licensed under other provisions of law to serve on Sunday"
- The sale of kosher wine, meat, or fish by a person who observes the Sabbath on Saturday
- The retail sale of greeting cards and film
- The retail sale of "gifts, souvenirs, antiques, secondhand furniture, handcrafted goods and art goods"
- The operation of pet stores
- The sale of lottery tickets
- The operation of a home video movie rental business
- The operation of a retail store or shop[6]
- "The retail sale of tobacco products, soft drinks, confectioneries, baby foods, fresh fruit and fresh vegetables, dairy products and eggs, and the retail sale of poultry by the person who raises the same"
- The retail sale of drugs and medicines

If a business does not qualify for an exemption, it may not legally operate in Massachusetts on Sundays unless it obtains a permit, as described below. If a business does qualify for one of these exemptions, it must then determine whether it is subject to the premium pay and voluntariness of work requirements of the Blue Laws, described below in Section I.B.4. If a business falls within the last three exemptions above, it should pay particularly close attention to these requirements.

[6] M.G.L. ch. 136, § 6(50). The statute specifically exempts "a store or shop and the sale at retail of goods therein, but not including the retail sale of goods subject to chapter 138 [alcoholic beverages], and the performance of labor, business, and work directly connected therewith on Sunday." *Id.* As explained in Section I.B.4, businesses that fall within this exemption are subject to premium pay requirements.

3. Permits for Necessary Sunday Work or Labor

Businesses that are not generally allowed to open on Sundays may obtain a single-day permit, generally for a small fee, if they have a valid reason to operate on a given Sunday.[7] In order to obtain a permit, the employer must submit a written request to the chief of police of the town or city in which the business is located.[8] The employer must apply within sixty days prior to the day on which the permit will be used, and the chief of police must issue, or deny issuance of, the permit within fifteen days of application.[9] The mayor or selectman of the target town or city sets the fee for the permit, which by statute must be $10.00 or less.[10]

4. Employees Who Work in Retail Stores

The Blue Laws draw a distinction between certain retail establishments and all other establishments and include unique requirements regarding premium pay and voluntariness of work that apply only to the former.[11] Specifically, these requirements apply to a retail business that "employs more than a total of seven persons, including the proprietor, on Sunday or any day throughout the week . . . ."[12] An employer must therefore determine whether it is a "retail" establishment that falls within these parameters. While this might seem to be a straightforward analysis, in today's world, a business does not always fall clearly into one specific exemption to the closure law. Thus, two questions often arise: (1) What if my business falls within both a retail and a non-retail exemption? and (2) What if my business falls within two different retail exemptions?

First, an employer may fall within more than one exemption, one of which is the retail exemption requiring premium pay. For example, a business may sell goods at retail within a restaurant. Must such an employer pay premium pay and follow the voluntariness of work requirement? Unfortunately, the answer is not entirely clear. The scope and interrelationship of the various exemptions within the Blue Laws are ambiguous, and there is little administrative or judicial guidance on these issues. However, the authorities available suggest that an employer that engages in the sale of goods at retail, even though conducting other business subject to another exemption from the Blue Laws, is subject to statutory premium pay obligations and must pay employees working on Sundays or designated holidays one and one-half times their regular rate. The Massachusetts Appeals Court has expressly rejected the argument that an employer may avoid premium pay obligations if it is legally authorized to conduct business under some other exemption to the Sunday and holiday closure laws and also sells goods at retail.[13]

[7] M.G.L. ch. 136, § 7.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] M.G.L. ch. 136, § 6(50).

[12] *Id.*

[13] *See Drive-O-Rama, Inc. v. Attorney Gen.*, 63 Mass. App. Ct. 769, 770-71, 829 N.E.2d 1153 (2005).

Similarly, some retail employers (such as gift shops and flower stores) may be exempt from the prohibition against work on Sunday pursuant to multiple retail exemptions, including Section 6(50). Although other retail provisions do not require premium pay, any retail operation that is covered by Section 6(50) must pay premium rates for work on Sunday.[14]

a. Sunday Premium Pay

Businesses that fall within the parameters of Section 6(50) must compensate employees who work on Sunday at no less than one and one-half times their regular rate of pay.[15] Neither Massachusetts nor federal law require compounding or "pyramiding" of overtime pay with premium Sunday pay, and an employer may reduce or "offset" its obligation to pay Sunday premium pay by the amount of overtime paid to an employee for hours worked in excess of forty during the same workweek.[16] For example:

- An employee who works a total of 48 hours in a week, 8 of them on Sunday, is entitled only to 8 hours of one and one-half times regular hourly pay
- An employee who works 50 hours, 8 of them on Sunday, is entitled to a total of 10 hours of one and one-half times pay
- An employee who works 30 hours, 8 hours on Sunday, is entitled to 8 hours of one and one-half times pay

Employers do not have to pay "bona fide executive or administrative or professional persons earning more than two hundred dollars a week" at this increased rate.[17] Non-retail employers that operate on Sunday are not subject to the premium pay requirements.[18]

b. Voluntariness of Work on Sunday

In addition to the premium pay requirements, no employee of a retail employer with more than seven employees can be required to work on Sunday, and "refusal to work for any retail establishment on Sunday shall not be grounds for discrimination, dismissal, discharge, reduction in hours, or any other penalty."[19] An employee is free to revoke his or her assent to work on Sundays after the time of hire, and an employer may not take action against an employee for

[14] *Id.*

[15] *Id.* (the concept and calculation of "regular rate of pay" is discussed in Section V.A).

[16] M.G.L. ch. 150, § 1A. *See also Swift v. Autozone, Inc.*, 441 Mass. 443, 806 N.E.2d 95 (2004). If an employer pays holiday pay for a set number of hours to its employees, those hours are not considered to be hours worked for purposes of calculating overtime. *See* DLS Opinion Letter MW-2002-018 (June 5, 2002).

[17] M.G.L. ch. 136, § 6(50). Massachusetts law does not define "bona fide executive or administrative or professional persons." Because these classifications mirror the terms used in the FLSA to sanction overtime exemptions, Massachusetts employers may consult this body of federal law for guidance in determining which of their employees are exempt from premium pay.

[18] M.G.L. ch. 136, § 6.

[19] M.G.L. ch. 136, § 6(50).

refusing to work on Sundays, even if the employee previously agreed to do so. As with premium pay, these provisions do not apply to non-retail employers operating on Sunday.[20]

5. Legal Holidays

Although the Sunday work laws are complex, their complexity pales in comparison to the patchwork of laws governing work on legal holidays. For example, the Massachusetts legislature extended the Sunday closure requirements to some of the statutory holidays, including Memorial Day (last Monday in May), Independence Day, Labor Day (first Monday in September), Columbus Day (second Monday in October) before noon, and Veterans Day (November 11) before 1 p.m.[21] Thus, businesses prohibited from operating on Sunday pursuant to the Massachusetts Blue Laws are also prohibited from operating on these holidays. Conversely, businesses permitted to operate on Sunday typically may stay open on holidays. The provisions regarding premium pay and voluntariness of work that apply to retail employers operating on Sunday also apply to retail employers operating on the holidays listed here.[22]

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 who operate that day must abide by the premium pay and voluntariness requirements.[23] Similarly, retail employers may only operate after 12 p.m. on Columbus Day and after 1 p.m. on Veterans Day, unless statewide approval has been granted by the Massachusetts Department of Labor Standards (DLS)[24] and the retailer has obtained a local police permit.[25] Retailers may, however, open after 12 p.m. on Columbus Day and after 1 p.m. on Veterans Day without DLS approval or a permit. Retail employers must follow the premium pay and voluntariness requirements for all work performed on those days, regardless of the time the work is performed.[26] Retail businesses may not open at all on Thanksgiving Day or Christmas Day without a permit from the DLS, which will only issue such permits on a statewide basis for all retailers.[27] Historically, the agency has not authorized the issuance of such permits and has taken the position that retailers may not open for business on those days.

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[20] M.G.L. ch. 136, § 6.

[21] M.G.L. ch. 136, §§ 13-16.

[22] M.G.L. ch. 136, §§ 6(50), 13, 16.

[23] M.G.L. ch. 136, § 13.

[24] Massachusetts General Laws Chapter 136, Section 7, gives the DLS the authority to grant police department officials or city selectmen the power to issue permits allowing Sunday work.

[25] M.G.L. ch. 136, § 15. *See also* DLS, *Statewide Approval for Early Openings on Columbus & Veterans Day 2016* (June 14, 2016), available at http://www.mass.gov/lwd/labor-standards/dls/columbus-and-veterans-day-2016.pdf (last visited Jan. 11, 2017); Office of Massachusetts Attorney General, *Massachusetts Blue Laws: Overview*, available at http://www.mass.gov/lwd/labor-standards/dls/mass-blue-laws/overview.html (hereinafter, "*A.G. Blue Laws Overview*") (last visited Jan. 11, 2017).

[26] M.G.L. ch. 136, § 13. *See also A.G. Blue Laws Overview*, *supra* note 25.

[27] M.G.L. ch. 136, § 15.

If New Year's Day, Independence Day, Veterans Day, or Christmas Day falls on a Sunday, then the holiday is observed on the following Monday, and the closure law applies on that day.[28] For retail employers, this means that the premium pay and voluntariness requirements also apply to that Monday.[29] Because the Sunday laws are still in effect as well, these requirements will therefore apply to two consecutive days if the employer chooses to operate both days.

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 . . . ." [30] To qualify as work that "can lawfully be performed on Sunday," the work must "for technical reasons require continuous operation . . . ."[31] Given this restrictive standard, manufacturing employees generally cannot be *required* to work on holidays. Employees may, however, volunteer to work on legal holidays. In addition, manufacturing employers may apply for a one-day local police permit to operate on a holiday in circumstances where "serious production inconvenience [] will result if such work is not performed on such holiday."[32]

The following charts—one applicable to retail establishments and the other to non-retail establishments—summarize the complex network of laws governing legal holidays.[33]

[28] M.G.L. ch. 4, § 7. When Christmas falls on a Sunday, a permit from the DLS is not required in order for retail employers to operate on the following Monday. M.G.L. ch. 136, § 15.

[29] For Christmas, the premium pay and voluntariness requirements will *only* apply to the Monday following the holiday, since retail stores may not open on Christmas Day if Christmas occurs on a Sunday.

[30] M.G.L. ch. 149, § 45.

[31] M.G.L. ch. 136, § 6(6).

[32] M.G.L. ch. 136, § 15. In addition, permits may be granted "for the performance of work on [legal] holiday[s] by clerical and office personnel in offices which are corporate offices or branches of interstate manufacturing operations working in other states on such holiday or in offices connected with manufacturing plants in the commonwealth" even if production work does not occur in the plants on the holiday, "if inconvenience will result if such work is not performed on such holiday." *Id.*

[33] M.G.L. ch. 136, §§ 13-16.

Retail Establishments – Holiday Requirements

	Is Premium Pay Required?	Can Employer Require Employee to Work?	Is Permit Required for Operation?
Martin Luther King Day Presidents Day Evacuation Day***** Patriots Day***** Bunker Hill Day*****	**Not** Required†	May Require Employee to Work†	**Not** Required
New Year's Day Memorial Day Independence Day Labor Day Columbus Day after 12 p.m. Veterans Day after 1 p.m.	Required	May **Not** Require Employee to Work	**Not** Required
Thanksgiving Day Christmas Day****** Columbus Day before 12 p.m. Veterans Day before 1 p.m.	Required	May **Not** Require Employee to Work	Required††

*****These holidays are observed only in Suffolk County.

******Retail stores may not open on Christmas Day if Christmas occurs on a Sunday.

†These holidays are not subject to M.G.L. ch. 136, § 5.

††Both statewide DLS approval and a local police permit are required.[34]

[34] *See A.G. Blue Laws Overview*, *supra* note 25.

Non-Retail, Non-Manufacturing[35] Establishments – Holiday Requirements

	Is Premium Pay Required?	Can Employer Require Employee to Work?	Is Permit or Blue Laws Exemption Required for Operation?
New Year's Day Martin Luther King Day Presidents Day Evacuation Day* Patriots Day* Bunker Hill Day* Columbus Day after 12 p.m. Veterans Day after 1 p.m.	**Not** Required	May Require Employee to Work	**Not** Required
Memorial Day Independence Day Labor Day Columbus Day before 12 p.m. Veterans Day before 1 p.m. Thanksgiving Day Christmas Day	**Not** Required	May Require Employee to Work	Either Exemption or Permit Required

***These holidays are observed only in Suffolk County.

6. Penalties for Violation of Sunday and Holiday Work Laws

The Office of 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. "[E]ach unlawful act or sale" constitutes a separate offense.[36]

In addition, employers that violate the rules regarding premium pay and voluntariness of work may be fined up to $1,000.[37] Enforcement of these provisions is also entrusted to the Attorney

[35] As explained above, unique requirements apply to manufacturers, pursuant to which manufacturing employees generally cannot be required to work on holidays, even if the employer may lawfully operate.

[36] M.G.L. ch. 136, § 5.

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

General, and private parties have no standing to sue for alleged violations.[38] Moreover, employees may not directly sue their employer for a violation of the Blue Laws.[39]

C. Day of Rest Laws

In addition to the Sunday work laws, two statutory provisions mandate a day of rest for employees.

1. One Day of Rest in Seven

The primary "One Day of Rest in Seven" provision requires that manufacturers, mechanical establishments, and mercantile establishments (other than those that fall under one of the exceptions specified in Section C.3) give employees at least twenty-four consecutive hours of rest in every seven-day period.[40] The twenty-four hour time period must include an unbroken period comprising the hours of 8 a.m. and 5 p.m.[41] The statute defines these categories as follows: (1) "'manufacturing establishments'" are "any premises, room or place used for the purpose of making, altering, repairing, ornamenting, finishing or adapting for sale any article or part thereof"; (2) "'mechanical establishments'" are "any premises, other than a factory . . ., where machinery is employed in connection with any work or process carried on therein"; and (3) "'mercantile establishments'" are "any premises used for the purposes of trade in the purchase or sale of any goods or merchandise, and any premises used for a restaurant or for publicly providing and serving meals and any premises used in connection with the service of cleansing, dyeing, laundering or pressing fabrics or wearing apparel."[42]

An employer might review this list of covered establishments above and quickly conclude that this law does not apply to it. However, while courts have provided little guidance as to which businesses constitute "manufacturing, mechanical, or mercantile" establishments, the one court that has addressed this issue interpreted the term "mechanical establishment" more broadly than a quick review of the definition might suggest. The court held that the computers an employee used in his job as a technology support engineer were "machines," and therefore the facility in which the engineer worked qualified as a "mechanical establishment."[43]

[38] *Local 1445, United Food & Commercial Workers Union v. Police Chief of Natick*, 29 Mass. App. Ct. 554, 558, 563 N.E.2d 693 (1990), further review denied, 409 Mass. 1102, 566 N.E.2d 1131 (1991).

[39] An employee may, however, sue for retaliation if an employer terminates the employee's employment, or otherwise takes action against the employee, for refusing to work on a Sunday or legal holiday to which the voluntariness requirement applies.

[40] M.G.L. ch. 149, § 48.

[41] *Id.*

[42] M.G.L. ch. 149, § 1.

[43] *Bujold v. EMC Corp.*, 23 Mass. L. Rptr. 347, 2007 WL 4415635, at *13-15 (Mass. Super. Ct. Dec. 7, 2007).

Employers subject to this provision must post a list in the workplace indicating which employees are required or allowed to work on Sunday and designating a day of rest for each.[44] Employees may not waive their day of rest and are prohibited from working on their designated day.[45]

2. Sunday Work Without a Day Off

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.[46] As with the One Day of Rest in Seven law, there are exceptions to this provision, which are discussed below. In addition, while "commercial occupation" is not defined in the statute, courts may interpret this term broadly, as with the term "mechanical." Most employers therefore will likely fall under at least one of the two Day of Rest statutes.

Unlike the One Day of Rest in Seven provision, employees may waive this right.[47] As with other waivers in the employment context, employers are advised to have employees sign a written acknowledgment that they are voluntarily waiving this right.

3. Exemptions to the One Day of Rest in Seven and the Sunday Work Without a Day Off Provisions

Certain employers that would otherwise be subject to these two provisions are not required to comply due to the continuous nature of their businesses. These employers may allow or require employees to work seven or more days in a row with no legal obligation to give them a day off within the six days following their work on a Sunday. Establishments and activities covered by this exemption include:

- "[E]stablishments used for the manufacture or distribution of gas, electricity, milk, or water"
- Hotels
- The "transportation of food"
- The "sale or delivery of food by or in establishments other than restaurants"[48]

[44] M.G.L. ch. 149, § 51.

[45] *Id.*

[46] M.G.L. ch. 149, §§ 47-48. While "commercial occupation" is not defined in the statute, courts may interpret this term broadly, as with the term "mechanical."

[47] M.G.L. ch. 149, § 47.

Employees whose duties include no work on Sunday other than the following are also exempted:

- Janitorial work
- Caring for machinery
- Caring for live animals
- The preparation, printing, publishing, selling, or delivering of newspapers
- The provision of farm or personal service
- The setting of sponges in bakeries
- "[A]ny labor called for by an emergency that could not reasonably have been anticipated"
- The work of "pharmacists employed in drug stores"[49]

Under special circumstances, the Attorney General may also grant an exemption to the One Day of Rest in Seven statute for a period not to exceed sixty days.[50]

4. Penalties for Violation

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.[51] The statutes do not provide for a private right of action.[52]

D. Compensable "Working Time"

Both Massachusetts and federal law require that employees be paid for all "working time."[53] Working time encompasses not only those hours spent by employees actively engaged in work,

[48] M.G.L. ch. 149, § 49. There are other One Day of Rest in Seven provisions specific to certain industries. For example, Massachusetts General Laws Chapter 160, Section 184, provides that certain railway employees "shall be allowed two days of twenty-four hours each in every month for rest with regular compensation," except during "extraordinary" emergencies.

[49] M.G.L. ch. 149, § 50.

[50] M.G.L. ch. 149, § 51A.

[51] M.G.L. ch. 149, §§ 47-48.

[52] *See Drexler v. Tel Nexx, Inc.*, 125 F. Supp. 3d 361, 377 (D. Mass. 2015) (holding that the One Day of Rest in Seven statute does not allow for a private right of action). However, as with the Blue Laws, an employee may sue for retaliation if an employer terminates the employee's employment, or otherwise takes action against the employee, for refusing to work seven consecutive days. *See Bujold*, 23 Mass. L. Rptr. 347.

[53] Massachusetts law does not define "work," but does define "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.

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.[54] Certain Massachusetts laws require employers to provide employees with breaks from work activity and dictate how, and if, employees must be compensated for this time. In addition, Massachusetts and federal law address the compensability of other "working time," such as travel, sleep, and on-call time.

1. Meal Breaks

Massachusetts law mandates that all employees (including exempt employees) receive an unpaid, thirty-minute meal break after six hours of work.[55] 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.[56] According to the Massachusetts Attorney General, employees must also be allowed to pray during meal breaks.[57]

A recent Superior Court case reiterated that under Massachusetts law, an employee must be "relieved of all work-related duties" during a meal break; otherwise the time is compensable.[58] The court found security officers' meal break time compensable because, among other things, the officers were required to keep their radios on and remain on-site during their breaks.[59]

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[54] 29 C.F.R. § 785.7; 454 C.M.R. § 27.02. Under both Massachusetts and federal law, "whenever an employer imposes special requirements or conditions that an employee must meet before commencing or continuing productive work, the time spent in fulfilling such special conditions is regarded as indispensable to the performance of the principal activity the employee is hired to perform." U.S. Department of Labor (DOL) Wage & Hour Opinion Letter FLSA1998 (Jan. 26, 1998). *See also* DLS Opinion Letter MW-2008-002 (Jan. 18, 2008) (adopting federal approach). For example, both the DOL and DLS have opined:

> Time spent undergoing a physical examination is time during which the employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee is subject to the employer's discretion and control. It is immaterial whether the time spent in undergoing the required physical examination is during the employee's normal working hours or during nonworking hours. The physical examination is an essential requirement of the job and thus primarily for the benefit of the employer.

DOL Wage & Hour Opinion Letter FLSA1997 (Oct. 7, 1997); DLS Opinion Letter MW-2008-002 (Jan. 18, 2008). If the physical examination is conducted prior to the establishment of an employment relationship, such time may not require compensation. DLS Opinion Letter MW-2008-002 (Jan. 18, 2008).

[55] M.G.L. ch. 149, § 100. *See also* Office of Massachusetts Attorney General Press Release, *Children's Retailer Settles Claims It Violated the Massachusetts Meal Break Law* (Mar. 9, 2012) (announcing settlement resolving investigation into meal break violations and stating that "employers cannot require employees, including managers, to work more than six hours without a 30-minute meal break"), available at http://www.mass.gov/ago/news-and-updates/press-releases/2012/2012-03-09-gymboree-settlement.html (last visited Jan. 11, 2017). Federal law does not require employers to provide meal breaks to employees. 29 C.F.R. § 785.19.

[56] DLS Opinion Letter MW-2003-008 (Aug. 5, 2003) (employees must be paid for meal break time where required to remain on employer's premises). *See also* Office of Massachusetts Attorney General, *Meal Breaks*, available at http://www.mass.gov/ago/doing-business-in-massachusetts/workplace-rights/leave-time/meal-breaks.html (hereinafter, "*Meal Breaks*") (last visited Jan. 11, 2017).

[57] *Meal Breaks*, *supra* note 56.

[58] *DeVito et al. v. Longwood Sec. Servs., Inc.*, Civil Action No. 2013-01724 (Leibensperger, J.) (Dec. 23, 2016). The court rejected the federal standard, which requires compensation only if meal break time was spent "predominantly for the benefit of the employer." *Id.*

[59] *Id.*

The Attorney General has enforcement authority for the meal break statute. Any employer or agent of the employer that violates the provisions of the statute may be subject to fines ranging between $300.00 and $600.00.[60]

a. Exemptions

The statute specifically exempts employers in the following industries from the meal break requirement:

- Iron works
- Glass works
- Paper mills
- Letterpress establishments
- Print works
- Bleaching works
- Dyeing works[61]

In addition, the Attorney General may grant exemptions to factories, workshops, or mechanical establishments if such exemptions are deemed necessary because of the "continuous nature of the processes or of special circumstances affecting such establishments, including collective bargaining agreements . . . ."[62]

b. Liability for Missed Breaks and Failure to Compensate Employees for Work Performed During Breaks

As set forth above, an employer or an agent of the employer that violates the meal break statute is subject to prosecution by the Massachusetts Attorney General. An employee has no right to sue the employer for a violation of that statute.[63] However, when an employer does not properly compensate an employee for work performed during a missed meal break, the employee may take

[60] M.G.L. ch. 149, § 100. The meal break statute states that any "employer, superintendent, overseer or agent who violates this section shall be punished by a fine of not less than three hundred nor more than six hundred dollars."

[61] M.G.L. ch. 149, § 101.

[62] *Id.*

[63] *Id. See also Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 377, 373, 893 N.E.2d 1187 (2008) ("[T]he Legislature's express language providing for enforcement by the Attorney General . . . combined with its specific provision of a right of action for certain other sections of G.L. c. 149, but not for § 100, weighs heavily against recognizing a private right of action under § 100.").

legal action for nonpayment of wages under Massachusetts General Laws Chapter 149, Section 148 (the Wage Act).[64] The following scenarios exemplify contrasting circumstances:

> Example 1: An employee misses a meal break, but the employer pays him or her for working through the break. Though the employee was fully compensated for the time, the employer has nonetheless violated the meal break statute and may face fines imposed by the Attorney General. In this circumstance, however, since the employee was paid for the missed break, the employee has no claim against the employer for nonpayment of wages.
>
> Example 2: An employee misses a meal break or does not take a complete meal break (i.e., goes back to work early), but the employer assumes the employee took the break and deducts thirty minutes from the employee's time. Once again, the employer has violated the meal break statute and may face fines. In addition, since the employee was not compensated for the missed break, the employee may have a claim against the employer for nonpayment of wages and may bring suit under the Wage Act.[65]

Employers should exercise caution in implementing timekeeping systems that automatically deduct a thirty-minute meal break or that prevent employees from logging back into work before their full thirty-minute break is taken. Such a system can lead to nonpayment of wages claims when an employer fails to make manual adjustments to account for the time actually worked. The employer therefore should typically confirm that any timekeeping system it utilizes allows employees to record all time actually worked.

The Attorney General has stated that an employee may agree to work or stay at the workplace during the meal break, but the employer must pay the employee for all hours worked.[66] While the employee may demonstrate voluntary waiver by working through the meal break or by remaining on the premises at the request of the employer during the meal break, the employer is strongly encouraged to obtain a signed, written waiver before allowing the employee to work through meal breaks.

Questions have also arisen regarding whether employers may impose a mandatory thirty-minute meal break and deduct those thirty minutes from employees' pay, whether or not the employees take the time off. By law, employees must be paid for all hours worked, or "working time."[67] While employers may enforce mandatory rules requiring that meal breaks be taken at a specific

[64] In addition, as explained at the end of this section, the Massachusetts Supreme Judicial Court (SJC) has held that in some circumstances employees may pursue breach of contract claims for missed meal breaks.

[65] M.G.L. ch. 149, § 150.

[66] *Meal Breaks, supra* note 56.

[67] *See* 454 C.M.R. § 27.02 (defining "working time"). This definition is similar to the federal definition of the "workweek," which includes "'all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace.'" 29 C.F.R. § 785.7 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691, 66 S. Ct. 1187, 90 L.Ed. 1515 (1946) (abrogated by statute on other grounds)).

time, they must pay employees when they work through them.[68] If an employee performs unauthorized work during a meal break, and the employer has actual or constructive knowledge that work was performed during that time, the employer must compensate the employee.[69] However, if the employer does not know, and has no reason to know, that an employee was working, the employer has no obligation to compensate the time.[70]

Massachusetts's highest court held in *Salvas v. Wal-Mart Stores, Inc.* that bargained-for contractual benefits, including unpaid meal breaks, have value and that employees who are deprived of their meal breaks "[l]ike any other party deprived of the benefit of their bargain . . . should be awarded damages that are 'the equivalent in money for the actual loss sustained by the wrong of another.'"[71] This ruling, plaintiffs' attorneys often argue, could give employees who have been deprived of contractually mandated meal breaks a claim against employers for breach of contract, even if they do not have a statutory claim for nonpayment of wages.

2. On-Call Time

Both Massachusetts and federal law dictate when an employee must be paid for on-call time. Under both, whether or not on-call time is compensable depends upon how the employee may use the 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.[72] On-call staff members who are allowed to relax when required to remain on company premises must nonetheless receive compensation because they do not have the freedom to pursue their own activities.[73] 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.[74] On the other hand, if an on-call employee is free to leave the work site and pursue activities of choice, then the employer need not compensate the time. Likewise, when an

[68] DLS Opinion Letter MW-2005-002 (Apr. 27, 2005); *Meal Breaks, supra* note 53.

[69] *Id.* (citing 29 C.F.R. § 785.11; *Republican Publ'g Co. v. Am. Newspaper Guild*, 172 F.2d 943, 945 (1st Cir. 1949); and *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) (an employer that knows, or should know, that an employee is working cannot stand idly by and allow an employee to perform work without the appropriate compensation)).

[70] *Id.* (citing *Prime Commc'ns, Inc. v. Sylvester*, 34 Mass. App. Ct. 708, 711, 615 N.E.2d 600 (1993) and *Forrester*, 646 F.2d at 414 (where an employer has no knowledge that an employee is working, and the employee fails to notify the employer or deliberately prevents the employer from discovering the work, the employer's failure to pay is not a violation of the FLSA)).

[71] *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 377, 375, 893 N.E.2d 1187 (2008).

[72] 29 C.F.R. § 785.17; 454 C.M.R. § 27.04(2). The U.S. Supreme Court distinguishes between employees who were "engaged to wait" and employees who "waited to be engaged"—the key difference being whether employees have the freedom to pursue the leisure activities of their choice while waiting to be called to work. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137, 65 S. Ct. 161, 89 L.Ed. 124 (1944).

[73] 29 C.F.R. § 785.17; 454 C.M.R. § 27.04(2). *See also Skidmore*, 323 U.S. at 139 (finding no evidence that the time on-call employees were allowed to spend relaxing on employer's premises, "even though pleasurably spent, was spent in the ways the [employees] would have chosen had they been free to do so").

[74] 29 C.F.R. § 785.17; 454 C.M.R. § 27.04(2). *See also* DLS Opinion Letter MW-2002-019 (June 28, 2002) (noting that time between split shifts is compensable when "the period of inactivity is too unpredictable, or is of such short duration, that the employee is prevented from effectively using the time for his or her own purposes and, therefore, the employee remains 'on duty'").

employee is free to leave but must carry a cell phone or pager, leave word at home, or notify the employer where he or she can be reached, the on-call time is *not* compensable.[75]

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 assigned any work.[76] For the hours actually worked, the employee must be paid his or her regular rate.[77] Employers that pay wages that exceed the minimum wage may opt to pay only minimum wage for any hours not actually worked.[78] For example:

- If an employee is scheduled to work three hours, reports to work, and performs three hours of work, the employee is owed three hours of pay at his or her regular hourly rate.

- If an employee is scheduled to work three hours, reports to work, and performs only one hour of work, the employee is owed one hour of pay at his or her regular hourly rate and two hours of pay at an hourly rate of minimum wage or above.

- If an employee is scheduled to work five hours, reports to work, and there is no work for the employee to perform, the employee is owed three hours of pay at an hourly rate of minimum wage or above.

- If an employee is scheduled to work three hours, but the employer calls and speaks with the employee prior to the time the employee reports to work to notify the employee that he or she should not report to work, the employee is owed nothing because he or she did not report to work.

The reporting pay requirement does not prohibit the scheduling of shifts that are less than three hours in duration.[79] In addition, an employer is not required to provide reporting pay to an

[75] *See* 29 C.F.R. § 785.17; DOL Wage & Hour Opinion Letter FLSA2009-17 (Jan. 16, 2009) (on-call time not compensable where employees carried mobile telephones but were free to travel and pursue leisure activities so long as they stayed within an hour's drive of job site).

[76] 454 C.M.R. § 27.04(1).

[77] *Id.*

[78] DLS Opinion Letter MW-2007-002 (July 9, 2007).

[79] DLS Opinion Letter MW-2000-006 (Oct. 13, 2000) ("[The requirement] does not prevent employers and employees from reaching an agreement that an employees' [sic] regular daily hours will consist of fewer than three hours, compensated at the minimum wage on an hour-for-hour basis. Rather [the provision applies] . . . to employees whose regularly-scheduled hours of work are curtailed by their employers due to lack of work.") (emphasis in original).

employee called in to perform work while on call because the employee is not "scheduled to work" a shift of three hours or more.[80] For example:

- If an employee is scheduled to work two hours, reports to work, and performs two hours of work, the employee is owed two hours of pay at his or her regular hourly rate. A third hour of pay is not required because the shift was scheduled for less than three hours.

- If the same employee reports to work and there is no work for the employee to perform, no payment is required. Because the shift was scheduled for less than three hours, the reporting pay requirement does not apply.

Organizations that have charitable status under the Internal Revenue Code are exempt from the reporting pay requirement.[81] There is no similar requirement under federal law.

4. Sleep Time

Because of the nature of certain jobs, an employer may give an employee a sleeping period during work. Under both Massachusetts and federal law, whether or not sleep time is compensable depends on the length of the employee's shift and, in some circumstances, the arrangement made between the employer and the employee. 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.[82] 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.[83] If those requirements are not met, all sleep time is compensable.[84]

5. Compensable Travel Time

Massachusetts regulations generally conform to the federal regulations in defining the types of travel time that constitute compensable work time.[85] An employer may establish a different rate

[80] For example, when an on-call technician was called into work for a job that took only one hour to complete, the DLS opined that the employer did not owe three hours of pay because nothing in the reporting pay regulation prohibits employees and employers from agreeing that an employee's regular hours will last less than three hours. DLS Opinion Letter MW-2002-015 (May 6, 2002). See also DLS Opinion Letter MW-2002-017 (June 4, 2002).

[81] 454 C.M.R. § 27.04(1).

[82] 29 C.F.R. § 785.21; 454 C.M.R. § 27.04(3)(a).

[83] 29 C.F.R. § 785.22; 454 C.M.R. § 27.04(3)(b). The agreement should be in writing and signed.

[84] 29 C.F.R. § 785.22; 454 C.M.R. § 27.04(3)(b). The Massachusetts sleep time regulation further provides that "[i]f an employee resides on an employer's premises on a permanent basis or for extended periods of time, not all time spent on the premises is considered working time. The employer and the employee may make any reasonable agreement as to hours worked which takes into consideration all of the pertinent facts." 454 C.M.R. § 27.04(3)(c); DLS Opinion Letter MW-2003-007 (Aug. 1, 2003).

[85] 29 C.F.R. §§ 785.35-785.41; 454 C.M.R. § 27.04(4).

of pay for travel time.[86] The rate cannot be lower than the minimum wage and must be established prior to the time the travel occurs.[87] Employers are advised to notify each employee of the travel rate in writing and obtain a signed acknowledgment before any travel occurs.

a. Commuting Time

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.[88] Much of employee travel time other than an employee's regular commute to and from work is compensable. The following are common examples of compensable travel time:

- "If an employee who regularly works at a fixed location is required to report to a location other than his or her regular work site," the employer must compensate the employee for all travel time in excess of the employee's normal commuting time and for associated travel expenses.[89]

- If an employee is required to report to a specified location to take transportation, the employer must compensate the employee for all time starting at the time the employee reports to the specified location and including the subsequent travel to and from the work site.[90]

- If an employee is "required or directed to travel from one place to another after the beginning of or before the close of a work day," the employer must compensate the employee for all travel time and for associated travel expenses.[91]

[86] DOL Wage & Hour Opinion Letter FLSA1999 (Jan. 22, 1999); DLS Opinion Letter MW-2002-019 (June 28, 2002).

[87] DOL Wage & Hour Opinion Letter FLSA1999 (Jan. 22, 1999); DLS Opinion Letter MW-2002-019 (June 28, 2002).

[88] 29 C.F.R. §§ 785.35-785.41; 454 C.M.R. § 27.04(4)(a). This can include time spent commuting to and from work between shifts. *See* DLS Opinion Letter MW-2002-019 (June 28, 2002). Where an employee works at home and then drives to a job site, the travel time may be compensable, even if it resembles a normal commute. *See Dooley v. Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234 (D. Mass. 2004).

[89] 454 C.M.R. § 27.04(4)(b). *See also* DLS Opinion Letter MW-2001-012 (Oct. 9, 2001) (length of temporary reassignment is irrelevant). Firefighters who attended a twelve-week training program for the purpose of being able to perform their duties safely and effectively did not need to be compensated for the time. *Taggart v. Town of Wakefield*, 78 Mass. App. Ct. 421, 428, 938 N.E.2d 897 (2010). The training occurred over a sufficiently extended period that it became the employees' regular work location, and the training was primarily for the firefighters' benefit, rather than the "convenience" of the town. *Id.*

[90] 454 C.M.R. § 27.04(4)(c). However, commuting time does not become compensable where an employee travels to a location other than his or her work site in order to take optional company transportation from that location to the work site. For example, where an employer offers employees rides on a boat used to haul equipment to an island work site that is also accessible by public transportation, the time spent traveling on the boat is not compensable. DLS Opinion Letter MW-2002-007 (Mar. 7, 2002). *See also* DLS Opinion Letter MW-2002-016 (May 6, 2002) (opining that where employees have option of traveling directly to work site or commuting to main office to travel in company truck to work site, travel time is not compensable because it is optional).

[91] 454 C.M.R. § 27.04(4)(d); 29 C.F.R. § 785.38. For example, if employees are required to begin work at the employer's main office to load trucks before traveling to their work site in a different location, the travel time from the main office to the work site is compensable. DLS Opinion Letter MW-2002-016 (May 6, 2002).

b. Overnight Travel

When travel keeps an employee away from home overnight, only a certain portion of the time spent out of town will be compensable. All travel time that occurs during an employee's regular workday is "clearly worktime" because "[t]he employee is simply substituting travel for other duties."[92] This rule is applicable not only to the employee's regular working days, but also to the corresponding hours on non-working days. Therefore, "if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday," travel time during those hours on the employee's non-working days (Saturday and Sunday) will be considered working time for which the employee must be compensated.[93] 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."[94] Massachusetts regulations explicitly adopt the DOL's position.[95] Therefore, employers need not compensate employees for time spent traveling outside of their regular working hours when the employees are away from home for at least one overnight. If, however, an employee is required to do work while traveling, all time spent performing the work must be compensated.[96] Employers are not obligated to pay employees for a regular meal period during overnight travel.[97]

c. Travel in a Company Vehicle

In most circumstances, travel in a company-provided vehicle does not transform ordinary commuting time into compensable working time. Thus, an employer is not required to compensate an employee who uses a company vehicle for ordinary commuting time, provided that (1) the vehicle is not more difficult to operate than a vehicle normally used for commuting; (2) "the employee incurs no out-of-pocket expenses for driving, parking or otherwise maintaining" the vehicle; (3) the "travel is within the normal commuting area for the employer's business"; and (4) the use of the vehicle is subject to an agreement between the employer and employee explicitly stating that ordinary commuting time is not compensable.[98]

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[92] 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).

[93] 29 C.F.R. § 785.39. *See also* DLS Opinion Letter MW-2002-012 (Apr. 17, 2002).

[94] 29 C.F.R. § 785.39.

[95] 454 C.M.R. § 27.04(4)(e) (adopting provisions of 29 C.F.R. § 785.39).

[96] 29 C.F.R. § 785.41.

[97] 29 C.F.R. § 785.39.

[98] DLS Opinion Letter MW-2007-001 (June 19, 2007) (citing guidelines from the Employee Commuting Flexibility Act of 1996). The DLS has opined that where these requirements are met, activities performed by the employee that are incidental to the use of the vehicle for commuting do not affect the non-compensability of the travel time. For example, where an employee services electronic equipment at customers' facilities and travels to work sites in a company van equipped with parts and tools, the fact that the employee may place calls to the company dispatcher before traveling to the work site and on occasion may load new parts into the van does not make travel time compensable. DLS Opinion Letter MW-2003-006 (May 16, 2003).

II. MANDATED TIME OFF AND MASSACHUSETTS LEAVE LAWS

Both Massachusetts and federal law require employers to allow employees time off for certain activities. This section, however, will focus on leave time specifically mandated by Massachusetts law.

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*.[99] Because most polling places open early in the morning, this type of leave is generally unnecessary. Employers need not pay employees for this time.[100]

B. Court Appearances

1. Massachusetts Jury Duty Leave

Massachusetts law prohibits the discharge of an employee for missing work due to service on a jury.[101] 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.[102] The court presiding over the jury trial has the authority to excuse an employer from making these payments if the employer can show extreme financial hardship.[103] If an employer is excused, the court will award the juror reasonable compensation of $50.00 or less in lieu of wages for the first three days of service.[104] For jury service beyond three days, the Commonwealth pays the juror on a per diem basis, and employers may decide whether or not to pay any difference between the Commonwealth's payment and the juror's regular wages.[105] Violation of this law constitutes contempt of court and may subject the employer to civil contempt penalties.[106]

In addition to the prohibition against discharge, an employer may not harass, threaten, or coerce an employee for performing jury duty or for exercising any rights under the jury duty laws.[107]

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[99] M.G.L. ch. 149, § 178.

[100] Office of Massachusetts Attorney General, Time Off to Vote (2016), available at http://www.mass.gov/ago/doing-business-in-massachusetts/labor-laws-and-public-construction/wage-and-hour/vacation.html (last visited Jan. 11, 2017).

[101] M.G.L. ch. 268, § 14A.

[102] M.G.L. ch. 234A, § 48.

[103] M.G.L. ch. 234A, § 49.

[104] *Id.*

[105] M.G.L. ch. 234A, § 51.

[106] M.G.L. ch. 268, § 14A.

[107] *Id.;* M.G.L. ch. 234A, § 61.

The law prohibits an employer from imposing compulsory work assignments on an employee or engaging in any "intentional act which will substantially interfere with the availability, effectiveness, attentiveness, or peace of mind of the employee" during the performance of his or her jury duty. A violation of this provision constitutes a crime and subjects the employer to a fine of up to $5,000. The statute also gives the employee the right to bring a civil suit against his or her employer for monetary damages and injunctive relief.[108] Injunctive relief may include reinstatement of a discharged employee or any other action the court may deem appropriate to remedy the violation of the statute. Upon a finding of willful conduct, the court may award treble damages and reasonable attorneys' fees to the juror.[109]

2. Massachusetts Employees Subpoenaed to Testify in a Criminal Action

Employers may not discharge or penalize employees on account of absences for witness service in criminal actions.[110] 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.[111] The statute is silent on whether an employer must pay an employee who misses work because he or she is subpoenaed to testify in a criminal action, suggesting that there is no such obligation.

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

A recently enacted statute requires Massachusetts employers 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.[112] The leave of absence must provide the employee sufficient time to participate in such services in his or her community of residence.[113]

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

[108] M.G.L. ch. 234A, § 60; M.G.L. ch. 234A, § 61.

[109] M.G.L. ch. 234A, §§ 60-61 (stating that any *willful* violation of M.G.L. ch. 234A, § 60 will constitute a violation of M.G.L. ch. 234A, § 61).

[110] M.G.L. ch. 268, § 14B (penalizing employees is barred, provided that the employer receives notification "of such subpoena prior to the day of [the employee's] attendance"); M.G.L. ch. 258B, § 3(l).

[111] M.G.L. ch. 268, §§ 14A and 14B; M.G.L. ch. 258B, § 3(l). Federal law protects employees who are selected to serve on a federal grand jury. The federal statute states: "No employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States." 28 U.S.C. § 1875(a). Employers that violate the statute (1) are "liable for damages for any loss of wages or other benefits . . . "; (2) "may be enjoined from further violations of [the jury duty statute] and ordered to provide other appropriate relief," including reinstatement of a discharged employee; and (3) may "be subject to a civil penalty of not more than $5,000 for each violation as to each employee . . . ." 28 U.S.C. § 1875(b).

[112] M.G.L ch. 149, § 52A 1/2. For purposes of this law, "veterans" refers to veterans as defined by M.G.L. ch. 4, § 7 as well as members of a department of war veterans listed in M.G.L. ch. 8, § 17.

[113] *Id.*

his or her intention to take such leave.[114] Employers are not requires to provide paid leave for participation in Memorial Day services.

In 2014, the legislature repealed the Massachusetts law requiring employers to provide leave to employees who are members of organized units of the ready reserve of the armed forces of the United States. However, employers still must comply with the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which imposes military leave requirements and prohibits employers from discriminating against persons because of their service in the National Guard, the Armed Forces Reserve, or other uniformed services.[115]

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)[116] and allows FMLA-eligible employees[117] to 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"[118]

[114] *Id.* The law does not define "reasonable notice."

[115] 38 U.S.C. §§ 4301-4335. Both veterans and active members of the military are protected by the Massachusetts Fair Employment Practices Act. M.G.L. ch. 151, § 4.

[116] 29 U.S.C. §§ 2601-2654. Under the FMLA, qualified employers must provide leave for illness and other absences. Specifically, the FMLA mandates that employers with fifty or more employees within a seventy-five mile radius provide eligible employees with up to twelve weeks of unpaid leave for the birth and care of a newborn child; the adoption of a child; the care of a spouse, child, or parent with a serious health condition; the employee's own serious health condition; a qualifying exigency arising from certain family members' call to military active duty; or up to twenty-six weeks of unpaid leave to care for certain family members injured in military service. Because of the complexity of the FMLA and this publication's focus on Massachusetts law, the FMLA will not be addressed in depth. Employers should also be aware that leave in excess of that provided by the FMLA and Massachusetts law may be a reasonable accommodation under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and Massachusetts General Laws Chapter 151B.

[117] An "eligible employee" is defined as "an employee who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested . . . ; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A).

[118] M.G.L. ch. 149, § 52D(b).

The provisions of the SNLA closely track those of the FMLA. For instance, under both Acts, the employer must clearly define the twelve-month period in which the twenty-four hours of leave may be taken. The Massachusetts Attorney General has issued an advisory stating that an employer can choose from a variety of methods to determine the twelve-month period, but must then apply the chosen method consistently and uniformly to all employees. Approved methods include the calendar year, the fiscal year, the employee's anniversary date, "[t]he 12-month period measured forward from the date of the employee's first request for leave under the [SNLA]," or "[a] 'rolling' 12-month period measured backward from the date an employee uses any leave under the [SNLA]."[119] This allowance applies to *non-exempt* employees only.[120] A deduction of less than a full day from the salary of an exempt employee would violate the salary basis test, causing the employee to lose his or her exempt status, as discussed in Section VI.A.2.

The SNLA allows leave to be taken on an intermittent or reduced leave schedule. This means that an eligible employee does not need to take all the leave at once, but may take the leave a few hours at a time depending on the employee's needs. Employers may require employees to take the leave in minimum increments of no less than one hour.[121]

As with the FMLA, employees taking SNLA leave may choose, or be required by their employer, to substitute accrued vacation, personal, or sick leave for leave taken under the SNLA.[122] Nothing in the SNLA requires employers to provide paid leave for situations other than those normally allowed.[123]

In contrast to the FMLA under which employees must, if feasible, provide *thirty* days' advance notice to their employer of the need to take leave, under the SNLA, employees need only provide *seven* days' notice, if feasible.[124] If the need for leave was not foreseeable, the law permits employees to inform their employer as soon as practicable.[125] Employers should notify employees of their ability to request leave under the SNLA by issuing a memorandum to each employee.[126] Employers may require that requests for SNLA leave be supported by a certification.[127]

[119] *See* Massachusetts Attorney General Advisory 98/1 (citing 29 C.F.R. § 825.200(b)).

[120] *See* DOL Wage & Hour Opinion Letter FLSA2007-6 (Feb. 8, 2007).

[121] M.G.L. ch. 149, § 52D(c); Massachusetts Attorney General Advisory 98/1.

[122] 29 U.S.C. §§ 2601-2654; M.G.L. ch. 149, § 52D(c); Massachusetts Attorney General Advisory 98/1.

[123] M.G.L. ch. 149, § 52D(c).

[124] 29 C.F.R. 825.302; M.G.L. ch. 149, § 52D(d).

[125] 29 C.F.R. 825.302; M.G.L. ch. 149, § 52D(d).

[126] Massachusetts Attorney General Advisory 98/1.

[127] M.G.L. ch. 149, § 52D(e). The Attorney General has prepared a model certification form, which is included in Massachusetts Attorney General Advisory 98/1.

The SNLA authorizes the Massachusetts Attorney General to initiate a complaint or criminal action against an employer that violates the Act.[128] Any employer convicted of a criminal violation of the Act will be subject to a fine of $500.00 or less.[129] In addition, any aggrieved employee may institute a civil action against his or her employer for monetary damages or injunctive relief. Injunctive relief may include the court requiring the employer to provide the requested leave or any other action the court deems appropriate to remedy the violation of the SNLA. If the employee prevails, he or she will be entitled to treble damages, costs of the litigation, and reasonable attorneys' fees.[130]

E. Massachusetts Parental Leave Act

The Massachusetts Parental Leave Act (MPLA) entitles an employee to take unpaid parental leave for the birth, adoption, or placement of a child 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).[131] The statute allows up to eight weeks of leave per child. Thus, an employee who has twins may take a total of sixteen weeks of leave. In addition, if an employer employs two employees who request leave for the birth, adoption, or placement of the same child, the employer is obligated to provide them with a total of eight weeks of leave between the two of them. The MPLA covers employers with six or more employees. FMLA leave may run concurrently with MPLA leave, but only if the FMLA leave is utilized for a reason that is protected under the MPLA (i.e., the birth or placement of a child).[132]

F. Proration of Bonus Payments to Employees on FMLA and MPLA Leave

Under the FMLA regulations, an employer may deny or prorate the bonus of an employee who has taken FMLA leave during the bonus period if the bonus is (1) based on easily measurable tasks (e.g., perfect attendance or number of products sold), and (2) other employees taking other kinds of leave also have their bonuses denied or prorated if they fail to meet their goals because of the leave. The rules do not discuss application of this concept to other kinds of bonuses, such as bonuses based on the performance of the company as a whole. Before prorating an employee's bonus, an employer should ensure that the bonus is based on achievement of specified goals and that those goals are spelled out clearly in the bonus policy. In addition, the policy should specify that bonuses will be prorated and that employees on all types of leave will have their bonuses prorated.

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[128] M.G.L. ch. 149, § 150.

[129] M.G.L. ch. 149, § 180.

[130] M.G.L. ch. 149, § 150.

[131] M.G.L. ch. 149, § 105D. Employers may choose to provide leave longer than eight weeks. Under the MPLA, employees who take leave longer than eight weeks automatically retain the same service credit and job restoration protections that they had during the first eight weeks of their leave, unless the employer informs the employee in writing, before the start of the parental leave and before the start of an extension, that taking longer than eight weeks of leave will result in a loss of these job protections. *Id.*

[132] 29 C.F.R. § 825.701(a).

Massachusetts law provides less guidance regarding proration of bonuses under the MPLA. Taking MPLA leave must not affect an employee's entitlement to bonuses (or other pay and benefits enumerated in the statute), but "when applicable" the amount of time spent on leave need not be included in the computation of the bonus. Massachusetts courts have not interpreted this language or determined specifically when and to what degree bonus payments and other benefits may be reduced or prorated due to MPLA leave. In addition, while Massachusetts courts generally look to analogous federal precedent in interpreting employment laws, those interpretations are not binding, and thus Massachusetts courts may take a more restrictive view regarding the denial or proration of bonuses for employees on MPLA leave.

G. The Massachusetts Earned Sick Time Law

The Massachusetts Earned Sick Time Law (ESTL)[133] entitles all employees whose primary place of work[134] is 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
- 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[135]
- 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.[136] Employees begin accruing sick time upon hire based on hours actually worked. Employees do not earn sick time during vacation or other paid time off.[137]

[133] M.G.L. ch. 149, § 148C.

[134] 940 C.M.R. 33.03(1) ("An employee is eligible to accrue and use earned sick time if the employee's primary place of work is in Massachusetts regardless of the location of the employer. An employee need not spend 50 percent or more time working in Massachusetts for a single employer in order for Massachusetts to be the employee's primary place of work.").

[135] For purposes of the ESTL, "domestic violence" is defined as "abuse committed against an employee or the employee's dependent child by: (1) a current or former spouse of the employee; (2) a person with whom the employee shares a child in common; (3) a person who is cohabitating with or has cohabitated with the employee; (4) a person who is related by blood or marriage; or (5) a person with whom the employee has or had a dating or engagement relationship." M.G.L. ch. 151A, § 1 (g1/2).

[136] M.G.L. ch. 149, § 148C(d)(1). Employees who are exempt from the FLSA's overtime requirements are assumed to work forty hours per week for purposes of the ESTL unless their normal workweek is less than forty hours per week, "in which case earned sick time shall accrue based on that normal work week." M.G.L. ch. 149, § 148C(d)(3).

[137] 940 C.M.R. 33.03(5).

Employers may also provide sick time in a lump sum grant each month or year, provided that the amount of the lump sum grant is no less than one hour of sick time for every thirty hours worked.[138] The governing regulations provide permissible schedules for providing such lump sum grants.[139] Employers who adhere to such schedules will be in compliance with the ESTL even if an employee's weekly hours fluctuate.

At the end of the benefit year, employees may carry over up to forty hours of unused sick time to the next benefit year.[140] Despite this carryover provision, employers need not permit employees to *use* more than forty hours of sick time per year. Indeed, if an employee's reserve or "bank" of sick time reaches forty hours, employers may delay further accrual until the reserve of hours decreases through use.[141]

Employees may begin using sick time ninety days after hire, as it is accrued.[142] Employers need not allow employees to use sick time before they have accrued it. The smallest increment of sick time that can be used in a given day is one hour. After the first hour of sick time is used in a given day, the employee may use sick time in the smaller of one hour or the smallest hourly increment the employer's payroll system uses to account for time.[143] If an employee's use of sick time requires the employer to call in a replacement, the employer may require the employee to use an amount of sick time equal to the time that the replacement employee works, up to a full shift of sick time.[144]

[138] *See* http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-faqs.pdf (last visited Jan. 11, 2017).

[139] For example, under the schedules, employees working an average of thirty-seven and a half hours to forty hours per month may be provided eight hours of sick time per month for five months. Employees who work an average of thirty hours per week may be provided five hours of sick time per month for eight months, and so on. 940 C.M.R. 33.07(8). Employers who provide sick time pursuant to one of the specified lump sum schedules need not track accrual of sick time. *Id.*

[140] 940 C.M.R. 33.03(10). Note, however, that if an employer provides sick time in a lump sum grant at the beginning of the benefit year, the employer need not allow employees to roll over any unused but accrued sick time. *See* http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-faqs.pdf at 7 (last visited Jan. 11, 2017). By contrast, employers who provide lump sum grants on a monthly basis must permit employees to roll over up to 40 hours of unused but accrued sick time. *Id.* Finally, an employer that provide unlimited sick time need not allow employees to carry over sick time from year to year. 940 C.M.R. 33.07(6)

In addition, employers may pay out to employees unused but accrued sick time at the end of the benefit year. 940 C.M.R. 33.03(27). Employers that pay out sixteen or more hours to an employee must grant that employee a lump sum of sixteen hours of *unpaid* sick time to use until the employee accrues new paid sick time. *Id.* If employers pay out less than sixteen hours, they must provide *unpaid* sick time in an amount equal to the number of hours paid out. *Id.*

[141] 940 C.M.R. 33.03(10).

[142] M.G.L. ch. 149, § 148C(d)(1).

[143] 940 C.M.R. 33.03(14).

[144] If the employee using sick time does not have sufficient accrued sick time to cover the entire period that the replacement worker is called in to cover for the employee's absence, the employer must provide the absent employee unpaid, job-protected leave to cover the portion of his or her absence not covered by accrued sick time.

The law prohibits employers from retaliating against employees for exercising or attempting to exercise their rights under the ESTL.[145] This means, for example, that an attendance policy that faults employees for taking time off under the ESTL is impermissible.

1. Pay for Time Off Pursuant to the ESTL

Employers with eleven or more employees must provide *paid* sick time. Sick time must be paid out at the employee's "same hourly rate."[146] For hourly employees who receive more than one hourly rate, the "same hourly rate" means either the wages that the employee would have been paid for the time that the employee was on sick leave or the weighted average of all regular rates during the previous pay period or another period of time used to calculate a blended rate of pay.[147] For employees paid a salary, the same hourly rate is determined by dividing the salary in the previous pay period by the number of hours worked during that period.[148]

Employees paid on a piecework or fee for service basis must be paid a reasonable calculation of what the employee would have earned had he or she worked.[149] Employees paid on a commission or base wage plus commission basis must be paid the greater of the base wage or the Massachusetts minimum wage. Finally, tipped employees must be paid at the Massachusetts minimum wage.[150]

2. Notification of Intent to Use Sick Time and Employee Certification

Employees are required to provide reasonable notification of their intent to use sick time. If use of sick time is foreseeable, an employer may require up to seven days' advance notice, provided that the employer has a written policy setting forth this expectation.[151] If an employee's need for sick time is not foreseeable, or is not foreseeable seven days in advance, the employee must provide "notice that is reasonable under the circumstances."[152] For example, employers may require employees to use reasonable notification systems customarily used to provide notice of absences or requests for leave.[153] Even if an employee fails to comply with notification requirements, the employer may not prevent or discourage employees from using sick time

[145] 940 C.M.R. 33.08.

[146] M.G.L. ch. 149, § 148. The "same hourly rate" does not include commissions, bonuses, incentive pay based on sales, or production, overtime, holiday pay, or premium pay. 40 C.M.R. 33.02.

[147] 40 C.M.R. 33.02.

[148] *Id.* Employees who are exempt from the FLSA's overtime requirements are assumed to work forty hours per week for purposes of the ESTL unless their normal work week is less than forty hours per week. *Id.*

[149] *Id.*

[150] *Id.*

[151] 40 C.M.R. 33.05.

[152] *Id.*

[153] *Id.*

provided that the employee has sick time available for use and intends to use it for one of the four permissible purposes listed above.

Employers may seek certification of an employee's need to use sick time if the employee's use of sick time:

- Exceeds twenty-four consecutive hours, or
- Exceeds three consecutive days on which the employee was scheduled to work, or
- Occurs *after* four uses of unforeseeable and undocumented sick time within a three-month period,[154] or
- Occurs within two weeks of an employee's last scheduled day of work before termination of employment, except in the case of temporary employees.[155]

Acceptable forms of certification include written documentation signed by a health care provider indicating the need for the sick time taken. To certify use of sick time to address the effects of domestic violence, an employee may submit a restraining order; police record; documentation of the abuser's conviction; a signed statement by a social worker, clergy member, legal advocate, or the like; or a signed written statement from the employee attesting to the abuse.

The ESTL has strong privacy protections for employees. Certification forms should not state the nature of an employee's illness or the details of domestic violence, nor should employers seek such information from employees.

3. Effect of Termination and Breaks in Service and Recordkeeping and Notice Requirements

Employers are not required to pay out unused but accrued sick time upon an employee's termination.[156] Employees who experience a break in service—that is, they end their employment for a period of time, and return to the same employer—may be entitled to maintain the right to use unused sick time they accrued before their break in service depending on the length of the break:[157]

- For breaks in service less than four months, employees maintain the right to use any sick time that they accrued prior to the break in service.

[154] For employees seventeen years old or younger, employers may also seek certification for use of sick time that occurs after three uses of unforeseeable and undocumented sick time in a three-month period. 40 C.M.R. 33.06.

[155] 40 C.M.R. 33.06 (listing the circumstances under which employers may request certification).

[156] *See* http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-faqs.pdf at 10 (last visited Jan. 11, 2017).

[157] 940 C.M.R. 33.03(31)-(33).

- For breaks in service between four and twelve months, employees may use sick time accrued before the break in service if the employees' bank of sick time exceeds ten hours.

In addition, employees whose break in service does not exceed twelve months need not wait ninety days before using sick time.[158]

Employers must keep records of use and accrual of sick time under the ESTL and maintain such records for three years.[159] Some employers may choose to substitute their own vacation, paid time off, or sick time policy for a policy under the ESTL. While such substitution is permissible, employers must ensure that their substitute policies allow employees to use at least the same amount of time, for the same purposes, under the same conditions, and with the same job protections as those provided under the ESTL. Employers that use their own substitute policies to provide sick time need not separately track use and accrual of sick time.

All employers must post in a conspicuous location a notice of the ESTL prepared by the Massachusetts Attorney General and either provide a copy of the notice to eligible employees or maintain a sick time policy in an employee handbook.[160]

H. Massachusetts Leave for Domestic Violance Victims and Family Members

Pursuant to An Act Relative to Domestic Violence of 2014 (ARDV), 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.

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.[161]

A "family member" is defined as (1) a parent, step-parent, child, step-child, sibling, grandparent or grandchild; (2) a married spouse; (3) persons in a substantive dating or engagement

[158] *Id.*

[159] 940 C.M.R. 33.03.

[160] 940 C.M.R. 33.09. The Attorney General's notice is available at http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-employee-notice.pdf (last visited Jan. 11, 2017).

[161] M.G.L. ch. 149, § 52E(b).

relationship and who reside together; (4) persons having a child in common regardless of whether they have ever married or resided together; or (5) persons in a guardianship relationship.[162]

The reasons for which leave can be taken include:

- Seeking or obtaining medical attention, counseling, victim services, or legal assistance
- Securing housing
- Obtaining a protective order
- Appearing in court or before a grand jury
- Meeting with a district attorney or law enforcement official
- Attending child custody proceedings
- Other issues relating to the abusive behavior[163]

Leave taken pursuant to ARDV can be paid or unpaid.[164] Employers may require employees to exhaust other available leave before taking leave but are not required to do so.[165]

An employee must provide his or her employer with "appropriate" advance notice of an intent to take leave.[166] The law does not specify any particular amount of time for "appropriate" notice. Advance notice is not required, however, when there is a threat of imminent danger to the health and safety of an employee or the employee's family member.[167] Under those circumstances, the employee, or anyone assisting the employee in addressing the abusive behavior, may notify the employer within three workdays following the employee's absence that the absence was to address issues relating to abusive behavior.[168] Such notice may be written or oral.[169] In addition, if an unscheduled absence occurs and the employee provides appropriate documentation within thirty days, the employer cannot take any negative action against the employee.[170]

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[162] M.G.L. ch. 149, § 52E(a)

[163] M.G.L. ch. 149, § 52E.

[164] M.G.L. ch. 149, § 52E(b)(iii).

[165] M.G.L. ch. 149, § 52E(g). *See also* Massachusetts Attorney General Advisory Concerning M.G.L. ch. 149, § 52E, available at http://www.mass.gov/ago/docs/workplace/dvla/m-g-l-c-149-s-52e-advisory.pdf (hereinafter, "*A.G. Advisory Concerning ARDV*") (last visited Jan. 11, 2017).

[166] M.G.L. ch. 149, § 52E(d).

[167] *Id*.

[168] *Id.*

[169] *See A.G. Advisory Concerning ARDV*, *supra* note 165.

[170] M.G.L. ch. 149, § 52E(d).

An employer may require documentation to substantiate the need for leave under ARDV, and the employee must provide such documentation within a reasonable period after the employer makes such a request.[171] Acceptable forms of documentation include: a court-issued protective order; an official document from a court, provider, or public agency; a police report or statement of a victim or witness provided to the police; official legal documentation attesting to perpetrator's guilt; medical documentation of treatment for the abusive behavior; a sworn statement from the employee attesting to being a victim of abusive behavior; a sworn statement from a professional who has assisted the employee or the employee's family (for example, a counselor, a social worker, or a member of the clergy).[172]

All information related to an employee's leave must be kept confidential and may only be shared in specific enumerated circumstances: (1) with the employee's written permission; (2) when required to do so by law or in order to cooperate with law enforcement; or (3) if the disclosure is necessary to protect the health and safety of the employee or coworkers.[173]

An employer may not discriminate or retaliate against an employee for taking leave under ARDV.[174] In addition, when an employee returns from leave, the employee must be returned to his or her original job or an equivalent position.[175]

ARDV also requires employers to notify employees of their rights under the statute.[176] Although the statute does not specify the type of notice required, employers are advised to provide employees with a policy covering ARDV leave.

III. PAYMENT OF WAGES

During recent years, payment of wages has been the subject of confusion among employers in Massachusetts and has resulted in much litigation. Massachusetts General Laws Chapter 149, Section 148, governs the timing and frequency of wage payments in the Commonwealth and defines what constitutes wages.[177] This statute is complex and difficult to interpret; the first sentence alone contains 593 words, 41 commas, 9 semicolons, and the word "and" 20 times. The questions employers struggle with include the following:

[171] M.G.L. ch. 149, § 52E(e).

[172] *Id.*

[173] M.G.L. ch. 149, § 52E(f).

[174] M.G.L. ch. 149, § 52E(i).

[175] *Id.*

[176] M.G.L. ch. 149, § 52E(k). *See also A.G. Advisory Concerning ARDV*, *supra* note 165.

[177] The Payment of Wages statute contains two narrow exemptions. *See* M.G.L. ch. 149, § 148. First, the statute does not apply to an employee of (1) a hospital "supported in part by contributions from the commonwealth or from any city or town," (2) "an incorporated hospital which provides treatment to patients free of charge," or (3) a hospital "conducted as a public charity," unless the employee requests that the hospital pay him or her weekly. *Id.* In addition, the statute does not apply to an employee of a co-operative association if the employee is a shareholder in the association, unless the employee requests that the association pay him or her weekly. *Id.*

- How frequently must wages be paid?
- When must wages be paid (i.e., how long after the end of the pay period)?
- What is included in wages (and what is not)?
- How must wages be paid (i.e., in what form)?
- When are wages "earned"?
- What deductions can an employer make from an employee's wages?

These questions do not always have clear answers, and the law in Massachusetts is continually evolving. This section summarizes the current law to help employers navigate these muddy waters.

A. Frequency and Timing of Payment

1. How Frequently Must Wages Be Paid?

In general, Massachusetts employers must pay hourly employees on a weekly or biweekly basis.[178] Employers that decide to switch from a weekly to biweekly pay period must provide employees with ninety days' advance written notice of the change.[179] Employers may pay exempt and salaried non-exempt employees biweekly or semi-monthly—or, at an employee's option, monthly.[180] In addition, employers may pay agricultural employees monthly.[181]

2. When Must Wages Be Paid?

For both exempt and non-exempt employees, Massachusetts law requires employees to be paid their wages—including overtime—within six days of the pay period in which the wages were earned.[182] Thus, if a pay period ends on a Friday, employees must receive all wages earned during that pay period, including overtime, by the following Thursday.

While the statute does provide for payment of wages within seven days under certain circumstances, those circumstances are rare and may in fact present problems for the employer

[178] M.G.L. ch. 149, § 148. See also Office of Massachusetts Attorney General Press Release, *Attorney General Martha Coakley's Office and Delta Airlines Reach Agreement to Change Employee Policies* (Sept. 18, 2009), available at http://www.mass.gov/ago/news-and-updates/press-releases/2009/ag-coakleys-office-and-delta-airlines-reach.html (last visited Jan. 11, 2017).

[179] M.G.L. ch. 149, § 148.

[180] M.G.L. ch. 149, § 148. An employer should obtain signed, written authorization from any salaried employee who chooses to be paid monthly. The employee can rescind that choice at any time.

[181] *Id.*

[182] *Id.*

under other Massachusetts laws. For example, an employer may pay an employee within seven days of the end of the pay period if the employee worked seven days in a calendar week during the period.[183] First, an employee would need to regularly work seven days a week in order for the employer to regularly take advantage of this law. Second, if employees are working seven days a week, the employer is likely violating the Massachusetts Day of Rest laws.[184] Thus, paying employees seven days after the end of the pay period presents significant risks to employers.

The payment of wages law also specifies the timing of payment upon termination of an employee. An employer must pay an employee who terminates his or her own employment for all hours worked on the next regular pay day following the end of employment.[185] In the absence of a regular pay day, the employer should pay the employee no later than the Saturday following termination.[186] When an employee's termination is involuntary, the employer must pay the employee all wages owed, including overtime, on the day of termination.[187] One federal court in Massachusetts has held that if an employee is paid wages electronically (i.e., through direct deposit), an employee must receive the funds in his or her account on the day of termination; mere initiation of the direct deposit by an employer on that date is insufficient to comply with the law.[188] Because Massachusetts includes vacation pay in the definition of wages, accrued but unused vacation pay must be included in the final paycheck.[189]

B. Wages Under Massachusetts Law

1. What Is Included in Wages (and What Is Not)?

This question has been the subject of much debate in Massachusetts in recent years. The Wage Act 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. Otherwise, it does not explicitly define the term "wages." Interpreting the statute, Massachusetts courts have held that the definition of wages does not include contributions to deferred compensation plans, deductions from pay for the purchase of stock if an employee requests the deductions, severance pay,

[183] *Id.*

[184] See Section I.C. The employer also may be violating the Sunday work laws. See Section I.B. *See also* C.J. Eaton, *Avoiding the Massachusetts "Blue Laws" Blues: Complying with the Complex Statutes Governing Sunday and Holiday Work, Insights Magazine* (Oct. 28, 2010), available at http://www.seyfarth.com/dir_docs/news_item/e0f5172e-fc25-44ee-b47a-a89c1c6deb1a_documentupload.pdf (last visited Jan. 11, 2017).

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *See Clermont v. Monster Worldwide, Inc.*, 102 F. Supp. 3d 353, 357 (D. Mass. 2015). In *Clermont*, the court declined to award the employee any damages for his employer's failure to deposit electronically all wages due to the employee on the date of termination because the employer deposited all such wages before the employee brought a complaint against the employer. Under the Wage Act, an employer may defend against a claim by paying all wages due prior to the "bringing of a complaint," including the initiation of a private civil action in court. *See id.* at 357-59 (citing M.G.L. ch. 149, § 150).

[189] Massachusetts Attorney General Advisory 99/1. *See also Massachusetts v. Morash*, 490 U.S. 107, 109 S. Ct. 1668, 104 L.Ed.2d 98 (1989).

discretionary bonuses, or health insurance premiums. Additional details regarding severance, bonuses, and stock purchase plans are found in Sections III.B.4-6.

2. Commissions

The law governing the timely payment of wages includes commissions 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."[190] 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.[191] If the amount of total commissions is "arithmetically determinable," a dispute regarding the amount of deductions that should be made from the commissions will not prevent the commissions from being "definitely determinable."[192] The Massachusetts Appeals Court has noted that "[b]y its terms, the language of the wage act regarding commissions applies broadly, and is restricted in its application only by the requirements that the commissions be 'definitely determined' and 'due and payable.'"[193]

3. Vacation Pay

Neither Massachusetts nor federal law requires employers to provide paid vacation benefits to employees. When employers do provide paid vacation, however, employers must treat accrued vacation like other wages under the Wage Act.[194] The Massachusetts Attorney General's Fair Labor Division has issued an advisory on vacation policies that sets forth its interpretation of the law relevant to vacation pay.[195] The Attorney General's interpretation of the Wage Act, as stated in that advisory, has been treated with deference and some of its provisions have been given effect by the Massachusetts Supreme Judicial Court (SJC).[196]

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[190] M.G.L. ch. 149, § 148. For a discussion of commissions and calculation of regular rate of pay under Massachusetts and federal law, see Section V.A.

[191] *Wiedmann v. The Bradford Group, Inc.*, No. MICV2001-3989 (Mass. Super. Ct. June 5, 2003) (Kern, J.). *See McAleer v. Prudential Ins. Co. of Am.*, 928 F. Supp. 2d 280, 287 (D. Mass. 2013) (a commission plan that affords an employer "[d]iscretion [to interpret or calculate commissions] prevents commissions from being definitely determined if the employer is under no obligation to award them"; finding commissions to be "definitely determined" where governing commission plan afforded an employer complete discretion for interpretation and calculation of commissions, because the commission payments themselves were not discretionary) (citing *Wiedmann v. The Bradford Group, Inc.*, 444 Mass. 698, 705, 831 N.E.2d 304 (2005)).

[192] *Wiedmann*, 444 Mass. at 705.

[193] *Okerman v. VA Software Corp.*, 69 Mass. App. Ct. 771, 776, 871 N.E.2d 1117 (2007); M.G.L. ch. 149, § 148. *See also Rosnov v. Molloy*, No. ESCV2007-0740, slip op. at 4-6 (Mass. Super. Ct. Apr. 20, 2009) (Kerns, J.) (direct appellate review granted by SJC on July 23, 2010) (finding referral fee that attorney agreed to pay associate for bringing in case constituted commission under the Wage Act).

[194] M.G.L. ch. 149, § 148; *Elec. Data Sys. Corp. v. Attorney Gen.*, 454 Mass. 63, 907 N.E.2d 635 (2009) (EDSC II); *Morash*, 490 U.S. 107; Massachusetts Attorney General Advisory 99/1.

[195] Massachusetts Attorney General Advisory 99/1. *See also Souto v. Sovereign Realty Assocs., Ltd.*, 23 Mass. L. Rptr. 386, 2007 WL 4708921, at *3 (Mass. Super. Ct. Dec. 14, 2007).

[196] *EDSC* II, 454 Mass. 63.

The advisory asserts that withholding vacation payments constitutes withholding wages and violates the Wage Act because an employee may not forfeit earned wages, including vacation payments, by agreement.[197] If an employer terminates an employee, whether or not for cause, or if an employee resigns his or her employment voluntarily, the employer must pay the employee for all the time worked through the termination date, including any earned, unused vacation time payments.[198] Employers and employees cannot contract around the requirement that an employee must be compensated for earned vacation upon termination.[199] However, an employer may establish as part of the terms of employment "the amount of paid vacation the employee will receive and/or a specific time of the year when the employee can take a vacation, depending on the needs or demands of the business."[200] The employer may also establish procedures for scheduling vacations.[201] Employers will benefit from drafting unambiguous vacation pay policies because Massachusetts courts have resolved ambiguities in favor of employees.[202]

a. Caps and "Use It or Lose It" Policies

Employers may cap the amount of vacation time that employees can accrue or earn.[203] For example, an employer may state in its policy that after accruing a total of ten days of vacation, an employee will cease to earn additional vacation days until he or she has used some of the accumulated time.[204] Thus, the employee would stop earning additional vacation time until the total accrued time drops below ten days.[205] In addition, the employer may enforce a "use it or lose it" policy that requires its employees to use all accumulated vacation time by a certain date or lose all or part of it.[206] A cap on accrual of vacation time or a "use it or lose it" policy, however, may result in an illegal forfeiture of earned wages if the employer fails to provide employees with

[197] *Id.* at 68; Massachusetts Attorney General Advisory 99/1. Examples of impermissible agreements include vacation policies that condition the payment of vacation time on continuous employment or that require employees to provide notice prior to quitting. *EDSC* II, 454 Mass. at 69 ("[I]f an employee is 'discharged from . . . employment,' the value of the vacation benefit earned up to that date and that would still be available if the employee remained at the job must be 'paid in full on the day of his discharge.'").

[198] *EDSC* II, 454 Mass. at 69-71; Massachusetts Attorney General Advisory 99/1. Continued payment of salary or other benefits after termination does not alleviate this obligation. *Dixon v. City of Malden*, 464 Mass. 446 (2013).

[199] *EDSC* II, 454 Mass. at 70 ("[T]he Wage Act would have little value if employers could exempt themselves simply by drafting contracts that placed compensation outside its bounds—as [the employer] attempted to do, when it stated that 'vacation time is not earned.'").

[200] Massachusetts Attorney General Advisory 99/1.

[201] *Id.*

[202] *Elec. Data Sys. Corp. v. Attorney Gen.*, 440 Mass. 1020, 1020-21, 798 N.E.2d 273 (2003) (*EDSC* I) (holding that personnel policy which stipulated that "[i]f you leave the company, you do not receive vacation pay for unused vacation time" only applied to employees who *voluntarily* left the company because policy was ambiguous and ambiguity should be resolved in favor of employee).

[203] Massachusetts Attorney General Advisory 99/1.

[204] *Id.*

[205] Such caps must be applied prospectively. *Id.*

[206] *Id. See also EDSC* II, 454 Mass. at 69 (noting that vacation pay may be "lost by disuse").

adequate notice of the policy or with an adequate opportunity to use the vacation time.[207] Exactly what constitutes an adequate opportunity to use accrued vacation is not discussed in the advisory, nor have the courts addressed that issue.

b. General "Leave" Category

Some employers combine sick leave, personal leave, vacation leave, and other types of leave into one general category called "annual leave," "paid time off," or "PTO."[208] If an employer with a general leave policy designates the number of hours or days of leave that are considered vacation, when an employee terminates employment, the employer is only required to pay the employee the unused hours designated as vacation.[209] Proof of designation of vacation time can be used to rebut a complaint of unpaid wages pursuant to the Wage Act.[210] An employer offering a combined paid leave benefit that makes no distinction between vacation and other types of leave may risk the entire allotment of leave being treated as vacation.

c. Designation of Accrual Rate

An employer should articulate clear guidelines regarding the accrual of vacation time, including the rate of accrual. For example, a policy might provide that an employee earns vacation time at the rate of one day per month and that the day is earned on the last day of each month, or the policy might specify that an employee accrues ten days each year on June 30. Similarly, an employer that combines leave into one bank should include guidelines regarding accrual of vacation time versus other leave time. For example, an employer that provides thirty days of paid time off per year might specify that vacation accrues at a rate of one and one-half days per month on the last day of the month, and that "other" time accrues at a rate of one day per month.

An employer should set accrual rates within very specific time frames because "a policy that provides for employees to earn a given amount of vacation 'a year,' 'per year,' 'on their anniversary date,' or 'every six months' is not clear . . . and subject to confusion concerning [the accrual] start and end dates. Where an employer's policy is ambiguous, the actual time earned by the employee will be pro-rated according to the time period in which the employee actually works."[211] An employer may also include a probationary period in its vacation policy, which stipulates that an employee will begin to accrue vacation time only after a set period of time, such as six months. Here again, the time frame should be clearly indicated.

[207] Massachusetts Attorney General Advisory 99/1.

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

d. Changes to Vacation Policies

An employer may amend the terms of its vacation policy, and any other condition of employment affecting wages, at any time.[212] Any such amendments must be prospective in nature, and employees must be given advance notice regarding the changes.[213] A new policy is more likely to be permissible if the employer gives the employees a copy of policy changes in advance and requires that each employee acknowledge in writing his or her understanding of the changes.[214] If a new policy will result in a forfeiture of accrued but unused vacation days, employees must be given a reasonable opportunity to use the time before it is forfeited.

4. Severance Payments

The Wage Act does not apply to severance payments. These payments are not referenced in the language of the statute, and the Massachusetts Appeals Court has held that severance benefits are not wages because such pay is not "earned," but rather is contingent upon termination.[215] Thus, severance pay is not included in the definition of wages and is not subject to laws governing the payment of wages.

5. Bonuses

a. Discretionary Bonuses

The Wage Act does not apply to discretionary bonuses or those that are subject to contingencies that do not occur. A bonus is "discretionary" if an employer is under no obligation to pay it.[216]

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[212] *Id.*

[213] Massachusetts Attorney General Advisory 99/1.

[214] *Id.*

[215] *Prozinski v. Ne. Real Estate Servs., LLC.*, 59 Mass. App. Ct. 599, 603, 797 N.E.2d 415 (2003). *See also Platt v. Traber*, 85 Mass. App. Ct. 1114, 2014 WL 1464268, at *1 (Apr. 16, 2014) ("Severance pay is not covered by the [Wage Act]."") (citing, *inter alia*, *Prozinski*, 59 Mass. App. Ct. at 605); *Scharf v. Isovia, Inc.*, 67 Mass. App. Ct. 1121, 2006 WL 3780747, at *1 (Dec. 26, 2006) (same) (citing *Prozinski*, 59 Mass. App. Ct. at 603). The SJC has cited the *Prozinski* decision with approval, *see Weems v. Citigroup Inc.*, 453 Mass. 147, 151, 900 N.E.2d 89 (2009) ("Our appellate courts have held that the [Wage Act] does not cover . . . severance pay.") (citing *Prozinski*, 59 Mass. App. Ct. at 605), and every trial court to address the issue with the exception of one much criticized and readily distinguishable outlier has reached the same conclusion. *See Birnbach v. Antenna Software, Inc.*, 2014 WL 2945869, at *3 (D. Mass. June 26, 2014); *Discipio v. Anacorp, Inc.*, 831 F. Supp. 2d 392, 396 (D. Mass. 2011) (Casper, J.); *Farrell v. Farrell Sports Concepts, Inc.*, 2012 WL 1994659, at *1 (Mass. Super. Ct. Apr. 6, 2012) (Inge, J.); *Doucot v. IDS Scheer, Inc.*, 734 F. Supp. 2d 172, 192-93 (D. Mass. 2010) (Bowler, J.); *Fitzgerald v. Chipwrights Design, Inc.*, 2005 WL 1869151, at *2-3 (Mass. Super. Ct. July 1, 2005) (Kern, J.); *Kittredge v. McNerney*, 2004 WL 1147449, at *3-4 (Mass. Super. Ct. May 7, 2004) (Gants, J.). *But see Juergens v. Microgroup, Inc.*, 2011 WL 1020856, at *2 (Mass. Super. Ct. Jan. 28, 2011) (holding that severance is wages). Trial court decisions that have come after *Juergens* have recognized that the case is inconsistent with appellate authority. *Birnbach*, 2014 WL 2945869, at n.1 (rejecting *Juergens* as inconsistent with *Platt*); *Discipio*, 831 F. Supp. 2d at 396 (rejecting *Juergens* as inconsistent with *Prozinski*); *Farrell*, 2012 WL 1994659, at *1 (same). *But see Rosen v. TMS, Inc.*, 2011 WL 2632186, at *1 n.13 (D. Mass. June 30, 2011) (noting that severance may be recoverable under the Wage Act) (citing, *inter alia*, *Juergens*, 2011 WL 1020856, at *2).

[216] *Weems*, 453 Mass. 147 at 153; *Weiss v. DHL Express, Inc.*, 718 F.3d 39, 48 (1st Cir. 2013) (dismissing Wage Act claim for unpaid bonus where bonus was contingent upon either an employee's continued employment with good performance or a determination by the employer that an employee was terminated without good cause, and employer determined that the employee was terminated with good cause; "[b]ecause [the employer] was under no obligation to pay the bonus, [the employee] was not

Thus, to be considered discretionary, the employer must have discretion to decide whether the employee receives a bonus, as well as the amount of any bonus received. Courts generally look to the language of the agreement or policy providing for the bonus to determine whether it is discretionary.[217]

b. Earned Bonuses

Courts have found that bonuses constitute wages when they are earned by an hourly employee, are calculated regularly, and are based on a fraction or a percentage of, for example, sales or bookings.[218] Bonuses that constitute wages typically bear strong similarities to commissions.

6. Stock

Massachusetts law explicitly excludes employee stock purchase plans from the definition of wages.[219] The SJC has held that the statutory language is clear and there is "no room for speculation" as to whether stock purchase plans are included in the definition of wages.[220] Additionally, unvested stock, awarded as part of an employee bonus plan, does not constitute wages for the additional reason that unvested stock only becomes valuable when it vests, making it contingent upon further employment and therefore not yet earned by the employee.[221]

7. Expense Reimbursements

The Massachusetts Court of Appeals has suggested that failure to reimburse expenses pursuant to a company reimbursement policy could constitute a failure to pay wages under the Wage Act.[222] While the court noted that the violation of a standard expense reimbursement arrangement would not typically constitute a violation of the Wage Act because the reimbursement is not

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deprived of wages that he earned" under the Wage Act); *Boesel v. Swaptree, Inc.*, 31 Mass. L. Rptr. 555, 2013 WL 7083258 (Mass. Super. Ct. Dec. 23, 2013) (interpreting *Weiss* to stand for the proposition that "a bonus with the contingency of continued employment was not a 'wage'" under the Wage Act; and finding that an annual bonus was not a wage under the Wage Act because payment of the bonus was contingent upon the employee earning it by continuing employment for a full calendar year, and employee did not do so). *But see Obourn v. Am. Well Corp.*, 115 F. Supp. 3d 301, 309 (D. Ct. 2015) (rejecting *Boesel*'s interpretation of *Weiss* and employer's argument that a bonus contingent on continued employment was *per se* outside the scope of the Wage Act) (interpreting and applying Massachusetts law). *See also Young v. Fidelity Research & Analysis Co.*, 87 Mass. App. Ct. 1123, 2015 WL 2401360, at *1 (Mass. App. Ct. May 21, 2015) (dismissing contract-based claims seeking to recover bonus payments under an employment agreement where contract "unambiguously required [the employee] to be actively employed" on certain dates, and the plaintiff was not).

[217] *See, e.g.*, *Weems*, 453 Mass. 147 at 153; *Boesel*, 2013 WL 7083258, at *4 ("I look to the terms of the Agreement to determine whether the Annual Bonus is a 'wage.'").

[218] *Beaule v. M.S. Inserts & Fasteners Corp.*, 17 Mass. L. Rptr. 623, 2004 WL 1109796 (Mass. Super. Ct. Feb. 24, 2004). As explained in Sections V.A.3, bonuses are not includable in regular rate calculations under Massachusetts law, regardless of whether they are discretionary. However, as explained in Section V.A.1-2, some bonuses *are* includable in regular rate calculations under federal law.

[219] M.G.L. ch. 154, § 8.

[220] *Weems*, 453 Mass. at 157.

[221] *Id*. *See also Harrison v. NetCentric Corp.*, 433 Mass. 465, 473-74 744 N.E.2d 622 (2001).

[222] *Fraelick v. PerkettPR, Inc.*, 83 Mass. App. Ct. 698, 706-8, 989 N.E.2d 517 (2013).

compensation "earned" by "labor, service or performance," it stressed the fact that the Wage Act prohibits an employer from exempting itself from timely and complete payment of wages by "special contracts . . . or by any other means."[223] According to the court, the plaintiff's complaint fairly alleged that the employer implemented a practice that "required the [plaintiff], under penalty of discharge, to advance, indefinitely, expenses for the employer's benefit" and that "this was a sufficient allegation of 'reasonable belief'" that the unreimbursed expenses fell within the scope of wages covered by the Wage Act.[224]

C. How Must Wages Be Paid?

1. Checks and Drafts

The Wage Act states that employers that pay wages to employees by check or draft must provide facilities for cashing the checks without requiring a deduction from the check or draft.[225] In 1980, the SJC opined on this outdated rule, holding that where the Commonwealth's Department of Labor and Industries, which was previously responsible for the enforcement of the provision, had imposed no affirmative obligation on a particular employer to furnish facilities for the cashing of checks to employees, the employer was under no obligation to provide them.[226]

2. Direct Deposit

An increasing number of employees are paid through direct deposit. The Office of Massachusetts Commissioner of Banks, which enforces and interprets banking laws, has issued an opinion letter stating that employers may require their employees to use direct deposit for their wages, as long as each employee remains free to choose the institution at which the funds will be deposited.[227]

The Office of the Commissioner finds this decision conforms with federal regulations holding that "[n]o financial institution or other person may require a consumer to establish an account for receipt of electronic fund transfers with a particular institution as a condition of employment . . . ."[228] The official federal commentary on this provision specifies that "[a]n employer may require direct deposit of salary by electronic means if employees are allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their salary deposited at a particular institution (designated by the employer) or receiving their salary by another means, such as by check or cash."[229]

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[223] *Id.*

[224] *Id.* at 708.

[225] M.G.L. ch. 149, § 148.

[226] *See Corraro's Case*, 380 Mass. 357, 358-59, 403 N.E.2d 388 (1980).

[227] Massachusetts Division of Banks Opinion Letter 04-041 (June 30, 2004).

[228] 12 C.F.R. § 205.10(e)(2).

[229] *See* 66 Fed. Reg. 15192 (Mar. 16, 2001).

3. Pay Cards

Pay cards are becoming increasingly popular among employers. Massachusetts law is silent on whether employers may require employees to accept payment by pay card. Employers therefore should seek the advice of legal counsel prior to implementing mandatory payroll debit cards.

D. When Are Wages "Earned"?

The Wage Act governs "wages earned" but does not define "earned." Until recently, the courts provided very little guidance. In 2011, the SJC addressed this issue for the first time, holding that

> the word "earn" is not statutorily defined, but its plain and ordinary meaning is "[t]o acquire by labor, service, or performance," or "[t]o do something that entitles one to a reward or result, whether it is received or not." Where an employee has completed the labor, service, or performance required of him, therefore, according to common parlance and understanding he has "earned" his wage.[230]

With respect to commissions, as explained in Section III.B.2, they are earned when they are "definitely determined" and "due and payable." Commissions meet these criteria if all contingencies that must occur for the employee to receive the commissions have occurred and the amount due can be precisely ascertained. Whether those criteria have been met is an oft litigated issue, and the guidance on this subject is less than clear. Employers should speak with their employment counsel if they have any questions or concerns regarding whether commissions or other wages are "earned."

E. What Deductions Can an Employer Make from an Employee's Wages?

Employers are limited in the deductions they can make from employee paychecks. The only permissible deductions from the basic minimum wage are those required by law and those allowed for lodging and meals.[231]

1. Mandatory Deductions

Both Massachusetts and federal law require mandatory deductions from employee wages for:

(a) state and federal income tax withholdings; and

[230] *Awuah v. Coverall N. Am., Inc.*, 460 Mass. 484, 492, 952 N.E.2d 890 (Mass. 2011) (citing Black's Law Dictionary 584 (9th ed. 2009)). *See also Kittredge*, 2004 WL 1147449, at *3 ("The use of the word 'earned' in the statute reflects that the work has been performed, and therefore prompt payment is due. Phrased differently, the word 'earned' means that the employee's entitlement to wages or salary payments derives from his performance of the work for which he was employed."); *Fitzgerald*, 2005 WL 1869151, at *2 ("[t]he use of the word 'earned' in the statute reflects that the work has been performed").

[231] 454 C.M.R. § 27.05(1).

(b) contributions, imposed on employees and employers, made in compliance with the Federal Insurance Contributions Act (FICA), including deductions for Social Security and Medicare.[232]

All employers must require each of their employees to complete Form W-4. For any employee who has not completed this form, the employer must withhold federal income taxes from the employee's wages as if the employee claimed only one withholding allowance—or two withholding allowances if the most recent W-4 shows that the employee is married.[233]

2. Deductions Authorized by Statute

a. Deductions for Lodging and Meals

(1) Lodging

Employers may deduct from the basic minimum wage a sum per week for lodging provided to an employee.[234] Lodging must include heat, potable water, and lighting.[235] A deduction for lodging is not permitted unless the employee wants the lodging and actually uses it.[236] 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[237]

(2) Meals

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 dinner[238]

[232] 26 U.S.C. § 3102; M.G.L. ch. 62B, § 2.

[233] M.G.L. ch. 62, § 3.

[234] 454 C.M.R. § 27.05(2). Federal law also contains provisions for lodging deductions. *See* 29 C.F.R. § 778.304(a)(1).

[235] 454 C.M.R. § 27.05 (2).

[236] *Id.*

[237] 454 C.M.R. § 27.05 (2)(a)-(c).

Further, deductions may not exceed the actual cost of the meal to the employer. Employers must comply with the following rules when making meal deductions:

1. The employee's written consent must be received before an employer can make meal deductions.

2. An employer may make a deduction from the basic minimum wage for one meal if the employee works three or more hours.

3. An employer may make a deduction from the basic minimum wage for two meals if the employee's work entirely covers two meal periods, or the employee works for eight hours.

4. An employer may make a deduction from the basic minimum wage for three meals if the employer provides the employee with lodging, or if special permission is granted by the Director of the Massachusetts Department of Labor and Workforce Development.[239]

(3) Deductions and the Calculation of Overtime

For purposes of calculating overtime for non-exempt employees, an employer may not consider deductions made for meals or lodging.[240] In other words, the employer must calculate overtime based on non-exempt employee wages prior to these deductions.

b. Uniforms – Deductions Not Allowed

Employers cannot deduct the cost of uniforms from wages. The Code of Massachusetts Regulations provides that an employer also may not require a deposit from employees for uniforms unless the Director of the Department of Labor and Workforce Development grants the employer permission to require a deposit.[241] The regulations define "uniform" as "[a]ll special apparel, including footwear, which is worn by an employee as a condition of employment."[242] If uniforms worn by employees are of similar design, color, or material, or form part of the "decorative pattern" of the place of business and make it clear that the employees work at the business, it will be presumed that the uniforms are worn as a condition of employment.[243] The regulations further provide that "[w]here an employer requires a general type of basic street

[238] 454 C.M.R. § 27.05(3). For federal regulations regarding deductions for meals, see 29 C.F.R. § 778.304(a)(1).

[239] *Id.*; 454 C.M.R. § 27.05(3)(a)-(c).

[240] 454 C.M.R. § 27.05(6).

[241] 454 C.M.R. § 27.05(4)(b). For federal regulations regarding deductions for uniforms, *see* 29 C.F.R. § 778.304(a)(2).

[242] 454 C.M.R. § 27.02.

[243] *Id.*

clothing, permits variation in details of dress, and the employee chooses the specific type and style of clothing, this clothing shall not be considered a uniform."[244]

If uniforms require dry cleaning, commercial laundering, or other special treatment, the employer must reimburse employees for the actual costs of the services. When uniforms are made of "wash and wear" materials that do not require special treatment and that are routinely washed and dried with other personal garments, the employer need not reimburse employees for uniform maintenance costs.[245]

c. Other Statutorily Permissible Deductions

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.[246] Recently, the Code of Massachusetts Regulations was amended to address "indirect deductions," stating that "[a]n employer may not separately charge or bill an employee for fees or amounts not allowed as deductions."[247] To date, neither the courts nor the DLS has provided any guidance on this new regulation.

In addition, while an employer need not pay employees for time not worked due to tardiness, deductions may not be made from the wages of a non-exempt employee beyond the proportionate wage that would have been earned during the time lost.[248]

3. Deductions Not Specifically Listed Above

Beyond mandatory or specifically authorized deductions, employers are limited in the deductions they can make from employee paychecks, but due to the ambiguous wording in the statute, the parameters regarding which deductions are allowable are not clear. Thus, this is currently a heavily litigated area of law, and a few recent court decisions have provided additional guidance regarding the limitations on deductions.

The most significant recent case, decided by the SJC, arose from an employee's claim that a company was deducting from its drivers' wages the costs of damage to company trucks in accordance with company policy.[249] Under that policy, a worker found to be at fault in an accident with a company truck could either accept disciplinary action or agree to set off damages against his wages.[250] The Court determined that Massachusetts law prohibits wage deductions

[244] *Id.*

[245] *Id.*

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

[247] *See* 454 C.M.R. § 27.05(5).

[248] M.G.L. ch. 149, § 152.

[249] *Camara v. Attorney Gen.*, 458 Mass. 756, 757-58, 941 N.E.2d 1118 (2011).

[250] *Id.*

associated with an employer's unilateral determination of an employee's fault and damages—*even if the employee has authorized the deductions*.[251]

The Court further explained that lawful set-offs are limited "to circumstances where there exists a clear and established debt owed to the employer by the employee," and held that an employer cannot circumvent this requirement by having an employee authorize deductions.[252] What does this mean? The Court offered the following examples of permissible deductions: (1) where there is proof of an undisputed loan or wage advance from the employer to the employee; (2) theft of the employer's property by the employee, as established in an "independent and unbiased proceeding" with due process protections for the employee; or (3) where the employer has obtained a judgment against the employee for the value of the employer's property.[253] The Court opined that there are other circumstances in which a set-off would be valid, such as when pursuant to a collective bargaining agreement, but declined to provide any further guidance.[254] As a practical matter, the Court's decision means that employers should limit deductions for theft or damage to property to those circumstances where fault and value have been determined by a court of law or government agency.

In another decision, the SJC held that an employer cannot lawfully withhold wages to an employee pending the customer's payment for the employee's services, even if the employer and employee agree that such wages are not earned until customer payment is received.[255] The Court found that such "chargebacks" violate the "no special contracts" language of the Wage Act because "they are not a valid setoff; they correspond to no 'clear and established debt owed to the employer by the employee.'"[256] Citing *Camara*, the Court also held that an employer may not deduct the cost of liability insurance from an employee's wages because those "costs are related to future damages that may never come to pass, and even if they do, may not be the responsibility of the employee."[257]

In the wake of these decisions, employers should carefully review all deductions taken from employees' wages. Similarly, all set-offs and "clear and established debts" should be carefully documented. For example, if an employer provides a loan or wage advance to an employee, the employer should obtain signed, written authorization at the time the loan or advance is made, which states the amount loaned or advanced and clearly sets forth the timing and amounts of any deductions that will be taken from the employee's wages. While the Court did not specifically address deductions for the accidental overpayment of wages—a scenario that arises frequently—the employer should follow the same procedure in those circumstances. In other words, the

[251] *Id*. at 763-64.

[252] *Id*. at 763.

[253] *Id*. at 763 n.13.

[254] *Id*.

[255] *Awuah*, 460 Mass. at 492-93 (citing *Camara*, 458 Mass. at 760).

[256] *Id*. at 493 (quoting *Somers v. Converged Access, Inc.*, 454 Mass. 582, 593, 911 N.E.2d 739 (2009)).

[257] *Id*. at 497.

employer should get a signed, written authorization stating the date and amount of the overpayment and the date of specific checks from which the deductions will occur. In any of these scenarios, total deductions cannot, in any wage payment, bring an employee's pay below minimum wage for each hour worked.

4. Employee Notification of Deductions

Employers must notify employees of the amount and nature of mandatory and voluntary deductions made from wages by issuing to each employee a pay slip or check stub, which includes this information.[258] Typical deductions are made for social security, unemployment compensation benefits, pensions, health and welfare funds, state taxes, federal taxes, dues for credit unions, and the like. At the time new employees receive their first paychecks, employers must notify them in writing of these deductions and contributions, and employers must notify all employees in writing when any new contributions or deductions will be made from their paychecks.[259]

F. Unclaimed Wages

If an employee fails to pick up his or her paycheck, the employer must hold the paycheck and must attempt to notify the employee about the unclaimed wages. Unclaimed wages are included in the definition of "abandoned property" in the Massachusetts Abandoned Property Law.[260] The statute states that all intangible property, such as money and drafts, will be presumed to be abandoned unless claimed by the beneficiary or person entitled to the property within three years of the date prescribed for payment or delivery.[261] Employers holding unclaimed wages must:

1. Send a notice by first class mail to the last known address of the employee;[262]

2. Report to the Treasurer and Receiver General of Massachusetts using the Treasurer's prescribed form;[263] and

3. Hold the check for at least two years and turn it over to the Abandoned Labor Division of the Office of the Treasurer within five years if the employee does not claim it.

[258] M.G.L. ch. 149, § 150A.

[259] *Id.*

[260] M.G.L. ch. 200A, § 1.

[261] M.G.L. ch. 200A, § 5.

[262] M.G.L. ch. 200A, § 7A.

[263] Abandoned property forms are available at http://www.mass.gov/treasury/unclaimed-prop/print-forms.html (last visited Jan. 11, 2017). Employers should include in such report the name and last known address of the owner of the property; the nature and identifying number of the property; the date on which the property became payable, demandable, or returnable; the date of the last transaction with the owner with respect to the property; and other information prescribed by the Treasurer. M.G.L. ch. 200A, § 7.

IV. MINIMUM WAGE

An employer's obligation to pay minimum wage is governed by both the Massachusetts Minimum Fair Wage Law and the federal Fair Labor Standards Act (FLSA).[264] The minimum wage rates established by these statutes and the circumstances under which they apply differ. The employer must apply whichever law provides a greater degree of protection for the employee.[265]

A. The Minimum Wage Rate in Massachusetts

With certain limited exceptions, as of January 1, 2017, all Massachusetts employees must be paid a minimum wage of $11.00 for each hour worked.[266] Because the Massachusetts minimum wage is higher than the federal minimum wage, Massachusetts employers must comply with the state requirement unless employees are exempt from the Massachusetts minimum wage.[267] In fact, Massachusetts law provides that the Commonwealth's minimum wage will always exceed the federal minimum by at least $0.50 per hour.[268]

1. Coverage Under the Massachusetts Minimum Fair Wage Law

In Massachusetts, the minimum wage law covers any person working in an "occupation."[269] The statute defines "occupation" as an "industry, trade or business . . . whether operated for profit or otherwise, and any other class of work in which persons are gainfully employed . . . ."[270] As discussed below, "occupation" is defined to specifically exclude certain types of work. The Massachusetts Minimum Fair Wage Law applies to private employers of all sizes.[271] This statute

[264] M.G.L. ch. 151; 29 U.S.C. § 206.

[265] The "workweek," which is discussed in Section I, forms the basis for determining an employer's minimum wage and overtime obligations. Under the FLSA, most courts have held that an employer need only pay its employees an average of at least minimum wage for all the hours worked during the workweek. *See United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 489-90 (2d Cir. 1960) (six unpaid hours per week did not constitute FLSA violation where average for all hours worked exceeded minimum wage), *but see Norceide v. Cambridge Health Alliance*, 814 F. Supp. 2d 17, 22-23 (D. Mass. 2011) (rejecting *Klinghoffer* rule in off-the-clock case by hospital employees). Whether a failure to pay workers straight time for off-the-clock work during non-overtime weeks in which employees earned at least minimum wage for all hours constitutes a statutory violation under the Massachusetts Wage Act remains unclear. However, employees have pursued recovery under contractual theories such as unjust enrichment or quantum meruit. *See Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 374-75 (2008); *but see Salerno v. Baystate Ford, Inc.*, 33 Mass. L. Rptr. 215, 2016 WL 513747, at *2 (Feb. 5, 2016) (Gordon, J.) (dismissing statutory Wage Act claim for off-the-clock work where workers were "paid in accordance with their agreed compensation arrangement").

[266] M.G.L. ch. 151, § 1. On June 26, 2014, Governor Deval Patrick signed into law a bill that increased the minimum wage to $9.00 an hour effective January 1, 2015; $10.00 an hour on January 1, 2016; and $11.00 an hour on January 1, 2017. *See* M.G.L. ch. 151, § 1, as amended through St. 2014, c. 144, §§ 28-30.

See Section I.D for a detailed discussion of how to determine the "hours worked" by an employee.

[267] The FLSA sets the current federal minimum wage at $7.25 per hour. 29 U.S.C. § 206(a)(1), as amended by Pub. L. No. 110-28 § 8102.

[268] M.G.L. ch. 151, § 1.

[269] M.G.L. ch. 151, §§ 1-2.

[270] M.G.L. ch. 151, § 2.

[271] *See id.*

does not include state or municipal employees—those employees are covered by the FLSA.[272] Some courts have held that the Massachusetts wage laws may apply to employees who work out of state if they have sufficient contacts with Massachusetts or if their employer is based in the Commonwealth.[273]

2. Coverage Under Federal Minimum Wage Law

The FLSA currently sets the federal minimum wage at $7.25 per hour. The rules for determining whether a particular business or employer is subject to the provisions of the FLSA are complex and beyond the scope of this publication.[274] However, because Massachusetts has relied heavily on the DOL's interpretation of the FLSA in interpreting the Massachusetts Minimum Fair Wage Law, it is necessary to understand the minimum wage under federal law. The FLSA requires that employers pay covered employees the federal minimum wage, unless the employees qualify for an exemption from the minimum wage requirement. An "employee" is broadly defined as "any individual employed by an employer."[275] For purposes of the FLSA, "employ" means "to suffer or permit to work."[276] Accordingly, much of the federal analysis regarding whether or not the minimum wage law applies focuses on whether the individual in question is an "employee" as defined by the statute.

B. Exemptions from Massachusetts and Federal Minimum Wage Law

Both Massachusetts and federal law exempt certain employees from their minimum wage requirements. Because differences between state and federal law must be resolved in favor of whichever law provides more protection to employees, an individual who is exempt from the Massachusetts minimum wage may still need to be paid the federal minimum wage.[277]

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[272] *See Grenier v. Town of Hubbardston*, 7 Mass. App. Ct. 911, 388 N.E.2d 718 (1979) (holding that the Massachusetts Minimum Fair Wage Law did not cover employees of the Commonwealth or its political subdivisions); DLS Opinion Letter MW-2002-001 (Jan. 11, 2002) (opining that "M.G.L. c. 149, § 30B, not M.G.L. c. 151, § 1A, governs overtime pay for state employees"); DLS Opinion Letter MW-2002-004 (Feb. 13, 2002) (opining that Massachusetts minimum wage law does not apply to municipal employees). *See also Newton v. Comm'r of Dep't of Youth Servs.*, 62 Mass. App. Ct. 343, 816 N.E.2d 993 (2004) (finding that M.G.L. ch. 151, the law governing minimum wage and overtime, "does not apply to Commonwealth employees").

[273] *See Dow v. Casale*, 29 Mass. L. Rptr. 132 (Mass. Super. Ct. 2011) (Massachusetts Wage Act covered employee working from his home in Florida because he maintained significant contacts with the Commonwealth), *aff'd*, 83 Mass. App. Ct. 751 (2013); *Gonyou v. Tri-Wire Eng'g Solutions, Inc*., 717 F. Supp. 2d 152, 155 (D. Mass. 2011) (Minimum Wage Law covered Connecticut-based employee because employer was Massachusetts corporation operating in Massachusetts).

[274] 29 U.S.C. § 203; 29 C.F.R. §§ 510-794. As in the Massachusetts Minimum Fair Wage Law, the FLSA specifically excludes certain types of work. *See* 29 U.S.C. §§ 206-207. In addition, employees working outside of the United States and its territories are not covered by the FLSA. 29 C.F.R. § 776.7(a). An employer that has employees working outside the United States should consult legal counsel regarding the employment laws of the countries in which its employees work.

[275] 29 U.S.C. § 203(e)(1). As interpreted by at least one federal court in Massachusetts, undocumented immigrants may be employees covered under the Act. *Lin v. Chinatown Rest. Corp*., 771 F. Supp. 2d 185, 190 (D. Mass. 2011) (discovery related to plaintiffs' immigration status not relevant to employees' FLSA minimum wage claims).

[276] 29 U.S.C. § 203(g).

[277] As noted, the Massachusetts minimum wage is higher than the federal minimum wage. Therefore, an employee who is exempt from minimum wage under the FLSA but not state law must still receive the higher Massachusetts minimum wage.

Employers should ensure that an employee is exempt from *both* the state minimum wage law and the FLSA before paying less than the federal minimum wage.

Both Massachusetts law and the FLSA exclude "volunteers" and "trainees" (also referred to as "interns") from their minimum wage provisions. Individuals falling into one of these categories are *not* employees, and they need not be paid for the work they do. Due largely to concerns about exploitation and the impact on work available for employees, however, both Massachusetts and federal law carefully restrict workers who qualify as "volunteers" and "trainees." Many employers use these terms loosely and often do not realize that a "volunteer" or "trainee" position must meet very specific requirements to qualify as exempt from minimum wage. The tests for "volunteer" and "trainee" are outlined in Section IV.B.1-2.

Massachusetts also excludes certain groups of employees from the minimum wage requirement, including those performing agricultural and farm work, persons in religious orders, and those performing outside sales work.[278] The FLSA excludes a broader group of employees, including but not limited to amusement park workers, fishermen, agriculture employees, employees of newspapers with limited circulation, switchboard operators, seamen, babysitters and those providing companionship services to the infirm, and criminal investigators.[279]

1. Volunteers

There is very little statutory or judicial guidance under either Massachusetts or federal law regarding when an individual may be considered a volunteer. Given this lack of guidance, the federal DOL (the entity tasked with enforcing the FLSA) has issued a series of opinion letters defining who is a volunteer under the FLSA. Because Massachusetts applies the same federal test for determining "volunteer" status, anyone deemed a volunteer under federal law is also exempt from the minimum wage requirements imposed by Massachusetts law.[280]

The DOL limits volunteer status to "those individuals performing charitable activities for not-for-profit organizations" and thus specifically precludes individuals from volunteering for a for-profit entity.[281] In general, individuals who volunteer their services for public, religious, or humanitarian

[278] M.G.L. ch. 151, § 2. "Agriculture or farm work" is defined as "labor on a farm and the growing and harvesting of agricultural, floricultural and horticultural commodities." *Id.* As discussed in detail in Section VI.B.1, "outside sales work" is defined as work "regularly performed by outside salesmen who regularly sell a product or products away from their employer's place of business and who do not make daily reports or visits to the office or plant of their employer." *Id.*

[279] 29 U.S.C. § 213(a). Each of these categories contains additional requirements that an employee must meet before he or she becomes exempt from the FLSA's minimum wage requirement.

[280] DLS Opinion Letter MW-2003-009 (Aug. 11, 2003) (stating that for purposes of determining volunteer status, Massachusetts has adopted the guidelines employed by the DOL). The DLS (the state entity that administers the minimum wage law) has issued two opinions on volunteers. First, volunteers working a maximum of seventy-two hours per month in a food pantry were not employees because they did not displace other employees and only worked part-time. *Id.* Second, a woman who volunteered full-time as a vocational case manager was an employee and not a volunteer where she worked alongside employees performing essentially the same work, she could not take time off without prior approval, and she was treated like an employee in all areas except wages and benefits. DLS Opinion Letter MW-2002-021 (Aug. 9, 2002).

[281] DOL Wage & Hour Opinion Letter FLSA1999 (Sept. 30, 1999). *See also Brown v. New York City Dep't of Educ.*, 755 F.3d 154, 163 (2d Cir. 2014) (holding that, under public agency exception, individuals need not be motivated solely by civic, charitable,

purposes without any expectation of payment are not considered employees of the non-profit organizations they serve and therefore are not entitled to pay under the minimum wage laws.

The DOL examines six factors to test whether an individual qualifies as a bona fide "volunteer":

1. The nature of the entity receiving the services
2. The receipt by the worker of any benefits, or expectation of any benefits, from his or her work
3. Whether the activity is less than a full-time occupation
4. Whether regular employees are displaced by the "volunteer"
5. Whether the services are offered freely without pressure or coercion
6. Whether the services are of the kind typically associated with volunteer work[282]

In applying this test, courts tend to focus on the benefit conferred on the organization by the worker.[283] If the organization relies too heavily on its "volunteers," courts are likely to find that the individuals' services are for the benefit of the employer and deem the individuals to be employees.[284] In addition, if an individual performs "volunteer" work in exchange for some important benefit, such as housing, the threat of losing that benefit might lead a court to hold that the work was not free from pressure or coercion.[285]

An organization may occasionally wish to pay its volunteers a stipend or offer some benefit in exchange for their services. The FLSA permits volunteers to receive compensation for their expenses, reasonable benefits, or a "nominal fee" without losing their exempt status.[286] The FLSA does not define what constitutes a "nominal fee," but regulations specify that such

or humanitary purposes to be volunteers, but instead may have mixed motivations for performing volunteer work, such as building one's resume).

[282] DOL Wage & Hour Opinion Letter FLSA2001-18 (July 31, 2001).

[283] *See, e.g.*, *Hallissey v. Am. Online, Inc.*, 2006 U.S. Dist. LEXIS 12964, at *34 (S.D.N.Y. Mar. 10, 2006) (denying AOL's motion for summary judgment because an issue of material fact existed as to whether "volunteers" were employees for FLSA purposes where internal company memoranda and testimony confirmed that AOL "viewed its volunteer force as something that was advantageous to its business").

[284] *Id.*

[285] *Genarie v. PRD Mgmt., Inc.*, 2006 WL 436733, at *12 (D.N.J. Feb. 17, 2006) (finding a worker was not a volunteer because she performed work in exchange for lodging, and the fear of losing her housing meant she was not free from coercion or pressure).

[286] 29 C.F.R. § 553.106(a). While this regulation is limited to state and federal governments, common sense suggests that the rule applies more broadly. The regulation lists several factors to consider in determining whether a fee is nominal: the distance traveled; the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status. *See also* DOL Wage & Hour Opinion Letter FLSA2004-6 (July 14, 2004).

payments must not be substitutes for compensation or linked to productivity.[287] Generally, payments that increase with the number of hours worked or the amount of work done strongly suggest that a worker is an employee and not a volunteer.[288] In addition, to be considered a "nominal fee," the sum of the payments to a volunteer should not exceed 20 percent of what a regular employee would be paid for performing the same service.[289]

2. Interns/Trainees

a. Massachusetts Exemption for Interns

The Massachusetts Minimum Fair Wage Law allows an exemption for "work by persons being rehabilitated or trained under rehabilitation or training programs in charitable, educational or religious institutions . . . ."[290] Determining whether an individual is a trainee, or intern, under Massachusetts law is a two-step process.

First, the program must be run by a charitable, educational, or religious institution.[291] "Charitable" institutions are those that have registered as charities with the Massachusetts Attorney General's Public Charities Division.[292] Massachusetts has yet to define "religious" or "educational" institutions for the purposes of this statute.[293]

Second, the program in question must qualify as a "training program" such that it falls outside the scope of the Commonwealth's minimum wage law. Because the term "training program" is not defined in the statute, Massachusetts relies on the six factors the DOL uses to determine that an individual is a "trainee" or "intern" and therefore not an employee covered by the FLSA:[294]

1. The training, even though it includes actual operation of the employer's facilities, is similar to that which would be given in an educational environment.

[287] 29 C.F.R. § 553.106(a); DOL Wage & Hour Opinion Letter FLSA2008-16 (Dec. 18, 2008).

[288] 29 C.F.R. § 553.106(a); DOL Wage & Hour Opinion Letter FLSA2008-16 (Dec. 18, 2008).

[289] 29 C.F.R. § 553.106(a); DOL Wage & Hour Opinion Letter FLSA2008-16 (Dec. 18, 2008).

[290] M.G.L. ch. 151, § 2.

[291] *Id.* *See also* DLS Opinion Letter MW-2002-013 (May 9, 2002). Individuals may also qualify as "trainees" if they participate for rehabilitation purposes. *See* M.G.L. ch. 151, § 2 (excluding "persons being rehabilitated or trained" from those working in an "occupation").

[292] DLS Opinion Letter MW-2002-013 (May 9, 2002).

[293] The DLS has opined that educational "programs" are those that make training an integral part of their educational curricula and provide supervision and possibly academic credit to students. DLS Opinion Letter MW-2003-002 (Feb. 10, 2003). *See also* DLS Opinion Letter MW-2001-017 (Nov. 19, 2001).

[294] DLS Opinion Letter MW-2003-002 (Feb. 10, 2003). Massachusetts law also includes a "qualified trainee" exemption for bona fide executive, administrative, and professional trainees, which does not appear in the FLSA. *See* M.G.L. ch. 151, § 1A(3). The statute does not define the term "qualified trainee," and there is no case law interpreting the exemption. There is therefore no guidance as to which employees qualify for the "qualified trainee" exemption. Similarly, Massachusetts offers an overtime exemption for "learner[s]" and "apprentice[s]." *See* M.G.L. ch. 151, § 1A(5). However, because there are no similar federal exemptions, employers must find different FLSA exemptions that would apply to these employees in order to take advantage of the state exemptions.

2. The internship is for the benefit of the trainees or students.

3. The trainees or interns do not displace regular employees, but work under their close supervision.

4. The employer derives no immediate advantage from the activities of the interns, and the employer's operations may be actually impeded.

5. The interns are not necessarily entitled to a job at the conclusion of the internship.

6. The employer and the interns understand that the interns are not entitled to wages for time spent in the internship.[295]

The DLS has stated that no single criteria is dispositive. As such, Massachusetts uses a "totality of the circumstances" approach that does not require that all six criteria be met in order for an individual to be deemed a "trainee."[296] Examples of qualifying training programs under Massachusetts law include:

- Students in a university's co-op program because successful completion of their internships was a graduation requirement, making it an integral part of their education[297]

- High school students in a vocational training program because the experience was part of each student's Individual Education Plan, they received academic credit for work performed, and they were carefully supervised[298]

- Students at a for-profit school for troubled youth who participated in a culinary skills program that followed a set curriculum and who were closely supervised by a faculty member[299]

- A program requiring troubled high school students to perform janitorial work, the primary purpose of which was to prepare students to "navigate a work environment" and cope with its demands (despite the menial tasks being performed—dishwashing, sweeping, garbage removal—the DLS narrowly granted trainee status because the program was "genuinely designed to ready the students for the workplace")[300]

[295] DOL Wage & Hour Fact Sheet #71 (Apr. 2010), available at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf (last visited Jan. 11, 2017).

[296] *Id.*

[297] DLS Opinion Letter MW-2001-017 (Nov. 19, 2001).

[298] DLS Opinion Letter MW-2003-002 (Feb. 10, 2003).

[299] DLS Opinion Letter MW-2002-005 (Feb. 20, 2002).

[300] *Id.*

b. Federal Exemption for Interns

As set forth above, the DOL has devised a six-factor test to determine whether a training program is exempt from the federal minimum wage requirements. The position of the DOL is that *all six* elements must be present for a worker to qualify as a trainee, or intern.[301] It is difficult for a for-profit company to satisfy all of these factors. The DOL most often finds that an individual is a trainee when he or she is a student receiving educational credit as well as practical experience related to his or her course of study.[302] The DOL has noted that true trainees will often impede a business's operations.[303] If the business receives a clear and immediate advantage, the work is largely unsupervised, and it takes the place of that done by regular employees, it is unlikely the worker will be deemed an intern.[304]

While courts often follow the DOL's criteria, the factors are not regulatory and do not have the force of law.[305] Federal courts have found intern status under the FLSA where workers disclaim an employment relationship, obtain legitimate training, and do not displace regular employees.[306] If the worker does not receive an educational benefit or another obvious advantage, courts will

[301] *See* DOL Wage and Hour Division, *Field Operations Handbook* § 10b11 (stating that all six criteria must be met); DOL Wage & Hour Fact Sheet #71 (April 2010), available at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf (last visited Jan. 11, 2017). *See also Donovan v. Am. Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982) (*Donovan* II) (holding that all six criteria must be met).

[302] For example, the DOL found the following to be trainees:

> Students working at the Women's Bar Association through an internship program, because they gained practical work experience, benefited from their increased job marketability, and were substantially supervised (DOL Wage & Hour Opinion Letter FLSA1988 (Jan. 28, 1988));
>
> Students in a university-run program, through which they performed unpaid work for a company in exchange for on-the-job experience, *id.*; and
>
> Students who received college credit for an internship that involved the students in real-life work situations and provided them with educational experiences that were not obtainable in a classroom setting (DOL Wage & Hour Opinion Letter FLSA1996 (May 8, 1996)).

[303] *See, e.g.*, DOL Wage & Hour Opinion Letter FLSA2006-12 (Apr. 6, 2006) (finding trainee status where a short, one-week program allowed participants to shadow actual employees and focus on career exploration while doing little actual work in return, and the sponsor invested substantial resources in designing and administering the program).

[304] DOL Wage & Hour Opinion Letter FLSA1996 (May 8, 1996).

[305] *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993) (refusing to apply an "all or nothing" approach and using a "totality of the circumstances" approach).

[306] *Donovan v. Am. Airlines, Inc.*, 514 F. Supp. 526 (N.D. Tex. 1981) (*Donovan* I) (trainees at an airline's school for flight attendants were not employees where they were informed that training did not guarantee employment; they acknowledged their trainee status in writing; they received meals and lodging; and they did not displace other employees); *Marshall v. Allen-Russell Ford, Inc.*, 488 F. Supp. 615 (E.D. Tenn. 1980) (participants in a training program for car salesmen were not employees because there was a significant amount of classroom time; they were under careful supervision; and the economic benefits of the limited sales completed were secondary to the learning done in the program).

ask whether the business benefits from the arrangement more than the trainee does.[307] Because federal law is stricter, an individual may qualify as a trainee—and thus the minimum wage exemption—under Massachusetts but not federal law.

C. The Payment of Special Sub-Minimum Wages

In addition to the exemptions to minimum wage, some employees may receive special sub-minimum wages under certain conditions. These employees include some tipped employees, certain student workers, and some disabled workers.

1. Tipped Employees

Some employees who earn more than $20.00 per month in tips may be paid a "service rate" of $3.35 per hour.[308] This service rate is discussed further in Tips and Service Charges, Section VIII.

2. Student Workers

Under certain circumstances, student workers may receive as little as 80 percent of the Commonwealth's minimum wage of $11.00 per hour (i.e., $8.80 per hour in 2017).[309] In order to pay this sub-minimum wage, an employer must first obtain a license, also known as a waiver, from the Massachusetts Department of Labor and Workforce Development.[310]

Additionally, to be eligible a student must fit into one of the following categories:

- A student working in a hospital or laboratory as part of a formal training program

[307] *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d Cir. 2016) (holding that under the FLSA "primary beneficiary test" should be used to decide whether unpaid individuals are employees or trainees, and articulating the three "salient features" of this test as (1) what the intern receives in exchange for his or her work; (2) what the economic realities of the relationship are; and (3) that the relationship should not be analyzed in the same manner as the standard employer-employee relationship.); *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015) (applying economic realities test to determine whether employer benefitted from intern's labor); *Archie v. Grand Cent. P'ship, Inc.*, 997 F. Supp. 504 (S.D.N.Y. 1998) (holding that participants in a job-training program for the homeless were employees because participation was indefinite in duration; the workers performed the same tasks as regular employees and worked unsupervised; and the organization derived more benefits from the work done than it conferred on the workers); DOL Wage & Hour Opinion Letter FLSA1994 (Mar. 25, 1994) (student interns who managed hostels for twenty-five hours per week in exchange for housing valued at $15.00 per night were employees because the employer derived an immediate advantage from the work performed).

[308] On June 26, 2014, Governor Deval Patrick signed into law a bill that increased the service rate to $3.35 per hour on January 1, 2016, and $3.75 on January 1, 2017. *See* M.G.L. ch. 151, § 1, as amended through St. 2014, c. 144, §§ 28-30. The bill also increased minimum wage rates, as discussed *supra* note 266. While Massachusetts allows an employer to pay the service rate to any tipped employee, the FLSA requires that the employee earn more than $30.00 per month in tips. *See id.*; 29 U.S.C. § 203(t). A tipped employee may be paid $2.13 per hour under federal law, as long as he or she makes no less than the minimum wage. *See* 29 U.S.C. § 203(t).

[309] The provisions of Massachusetts law regarding sub-minimum wages for "student workers" are distinct from and should not be confused with the trainee/interns requirements discussed above.

[310] 454 C.M.R. § 27.06(1).

- A student enrolled in a school, college, university, or bona fide educational institution,[311] who is also employed by that institution

- A secondary school student working on a hospital ward, or in a school or college dining room or dormitory, if the organization qualifies as a non-profit under the Internal Revenue Code and maintains a ratio of one minor to five adults working in those areas[312]

A seasonal camp may apply for a complete minimum wage exemption (rather than a waiver to pay 80 percent of minimum wage) for counselors and counselor trainees.[313]

Federal law also allows the payment of special sub-minimum wages to certain student workers.[314] Student workers who fall into the narrow categories listed above also are likely to satisfy the federal requirements.[315]

3. Workers with Disabilities

Both Massachusetts and federal law allow employers to pay a special sub-minimum wage to certain workers with disabilities.[316] In order to pay the special sub-minimum wage, an employer must first obtain certificates from the Massachusetts Director of the Department of Labor Standards[317] and the Administrator of the DOL's Wage and Hour Division.[318] The Director will not issue a certificate unless the employer has already obtained a certificate from the DOL.[319]

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[311] A "bona fide educational institution" is one that is accredited by a recognized source. 454 C.M.R. § 27.02.

[312] 454 C.M.R. § 27.06 (1).

[313] M.G.L. ch. 151, § 7. *See also* DLS Opinion Letter MW-2015-01 (Jan. 7, 2015); DLS, *Application for Waiver of Minimum Wage for Seasonal Camp Counselors*, available at http://www.mass.gov/lwd/docs/dos/mw/mw-seasonal-camp-app-2015.pdf (last visited Jan. 11, 2017); DLS, *Topical Outline of Massachusetts Minimum Wage and Overtime Law and Related Regulation*, available at http://www.mass.gov/lwd/labor-standards/minimum-wage/mw-topical-outline.pdf (last visited Jan. 11, 2017). Non-profit camps are also extempt from the overtime requirements of Massachusetts law, and for-profit seasonal camps may apply for an overtime waiver. *Id*.

[314] 29 U.S.C. § 206(a)(1), as amended by Pub. L. No. 114-187 § 403.

[315] 29 C.F.R. §§ 519.2 and 520.201. Under the FLSA, additional categories of student workers may qualify for sub-minimum wages, including full-time students working in retail, agriculture, or educational institutions; student-learners participating in bona fide vocational training programs; apprentices learning skilled trades through registered programs; and learners who are being trained for skilled occupations but who, when initially employed, produce little or nothing of value. *Id.* (Employers interested in obtaining a certificate allowing them to pay a sub-minimum wage should contact the U.S. Department of Labor, Wage and Hour Division regional office with jurisdiction over their state. The Northeast Region office can be reached at (215) 861-5800.)

[316] 29 C.F.R. § 525.9; M.G.L. ch. 151, § 9.

[317] M.G.L. ch. 151, § 9; 454 C.M.R. §§ 27.02 and 27.06.

[318] 29 C.F.R. § 525.7.

[319] 454 C.M.R. § 27.06. *See also* DLS, *Application for Waiver of Minimum Wage for Employees with Disabilities*, available at http://www.mass.gov/lwd/docs/dos/mw/mw-waiver-disabilities.pdf (last visited Jan. 11, 2017); DLS, *Topical Outline of Massachusetts Minimum Wage and Overtime Law and Related Regulation*, available at http://www.mass.gov/lwd/labor-standards/minimum-wage/mw-topical-outline.pdf (last visited Jan. 11, 2017).

Massachusetts law defines a disabled worker as an "employee whose earning capacity is impaired by age or physical or mental deficiency or injury, or . . . an employee who is certified by the secretary of health and human services . . . as a handicapped person . . . ."[320] Unfortunately, there is limited Massachusetts authority interpreting this provision. As a result, employers may look to the relevant federal law for guidance since the Massachusetts and federal provisions are, in large part, consistent with one another. Employers should be aware, however, that federal law in this area is more detailed and thus may be interpreted or enforced differently.

Under the FLSA, "workers with disabilities" include those whose "productive capacity" is impaired by physical or mental disability, age, or injury.[321] Such disabilities may include blindness, mental illness, mental retardation, cerebral palsy, or substance abuse.[322] Conditions that *do not* qualify as disabilities for sub-minimum wage purposes include vocational, social, cultural, or educational disabilities, chronic unemployment, receipt of welfare benefits, nonattendance at school, juvenile delinquency, and being on parole or probation.[323] Employers that pay disabled employees on an hourly basis must review the sub-minimum wages paid to these employees every six months. Wages for all employees with disabilities must be adjusted yearly to reflect changes in the prevailing wages paid to experienced non-disabled individuals doing the same type of work in the same geographic area.[324]

[320] M.G.L. ch. 151, § 9.

[321] 29 C.F.R. § 525.3(d); DOL Compliance Poster, *Employee Rights for Workers with Disabilities Paid at Special Minimum Wages* (July 2009), available at http://www.dol.gov/whd/regs/compliance/posters/disabc.pdf (hereinafter, "*Disabilities Poster*") (last visited Jan. 11, 2017).

[322] 29 C.F.R. § 525.3(d).

[323] *Id.*

[324] 29 C.F.R. § 525.9(b).

Exemptions from Massachusetts and Federal Minimum Wage Requirements

	Massachusetts Law	Federal Law
Volunteers	Same as federal law	Must satisfy six-factor test: 1. Nature of entity receiving services 2. Worker's expectation of receiving benefit from the work 3. Less than full-time occupation 4. No regular employees are displaced 5. Freedom from pressure or coercion 6. Services are typically associated with volunteer work
Interns/Trainees	Two requirements: 1. The employer must be a charitable, educational, or religious institution 2. The federal six-factor test then applies, but Massachusetts takes a "totality of the circumstances" approach	Six-factor test, with the DOL taking the position that all six requirements must be met: 1. Training is similar to that which would be given at a vocational school or academic institution 2. Training is for the benefit of the trainees or students 3. Regular employees are not displaced 4. Employer derives no advantage 5. Trainees or students not necessarily entitled to a job at the conclusion of the training period 6. Understanding that the trainees or students are not entitled to wages

Massachusetts and Federal Sub-Minimum Wage Requirements

	Massachusetts Law	Federal Law
Tipped Employees	See Tips and Service Charges, Section VIII	
Student Workers	Requires waiver from the Massachusetts Department of Labor Standards To qualify, the student must fit into one of the following categories: 1. Hospital or laboratory 2. Enrolled in educational institution and employed by the same 3. Summer camp counselors or counselor trainees 4. Secondary school students working on hospital wards or college dining rooms/dorms	Students who meet Massachusetts law requirements are likely to satisfy the federal requirements
Camp Counselors or Counselor Trainees	Requires waiver from the Massachusetts Department of Labor Standards Camp must be seasonal (i.e., operate for fewer than 120 days per year)	Employees of "seasonal establishments" as defined by the FLSA are exempt from the federal minimum wage requirements[325]
Workers with Disabilities	Certificate from the Director of the Department of Labor Standards Individuals qualify if their earning capacity is impaired Employer must first obtain Certificate from federal DOL	Certificate from the DOL Wage and Hour Division Individuals qualify if their "productive capacity is impaired"

D. The Prevailing Wage for Work on Public Contracts

Both Massachusetts and the federal government set special "prevailing" wage rates for employees working on public works contracts.[326] These wage rates always exceed the minimum wage—sometimes by a very large margin. In Massachusetts, when employees perform work at two different wage rates during a single week—as often occurs where employees perform prevailing wage work at multiple locations, in multiple job classifications, ar different municipalities, or

[325] 29 U.S.C. § 213(a)(3).

[326] 40 U.S.C. § 276a; 29 C.F.R. §§ 1, 3, 5-7; M.G.L. ch. 149, § 26-27H.

when operating different types of construction equipment—overtime must be calculated using a regular rate that is a weighted average of those different pay rates, as discussed further in Section V.A.11.[327] This is an important difference from federal law and the laws of most states, which in certain circumstances allow employers to calculate overtime at the rate in effect at the time that overtime is worked.

The Massachusetts Prevailing Wage Statutes require that certain categories of employees of contractors and subcontractors on certain types of projects funded by the state or a municipality be paid a prevailing wage set by the DLS.[328] The statutes are complex, and the requirements vary depending on the type of work being performed. Employees covered by the Massachusetts prevailing wage laws include those working on the construction of public works,[329] those who operate trucks or other equipment in non-construction public works projects,[330] those who move office furniture or fixtures for the state or a municipality,[331] and those who clean and maintain state-owned buildings.[332]

1. Construction of Public Works in Massachusetts

"Construction" is defined broadly to include any addition to or alteration of a public building or public work, including painting or installation of flooring, as well as certain work done prior to construction, including soil exploration and demolition of existing structures.[333] However, DLS interpretive guidance states that the "addition or alteration" must be part of the public work itself. For example, assembling and placing furniture or other items for use in, but not affixed to, a public building is not "construction" work.[334] The term "public works" is also broadly

[327] M.G.L. ch. 149, § 26; DLS Opinion Letter MW-2006-002 (June 12, 2006) (noting that the Commonwealth's overtime requirements apply equally to employees paid a prevailing wage); DLS Opinion Letter MW-2002-010 (Apr. 2, 2002) (noting that a federal law requiring overtime pay for any hours worked in excess of eight per day was repealed, and Massachusetts only requires overtime pay for hours worked in excess of forty per week); *Mullally v. Waste Mgmt. of Massachusetts Inc*., 452 Mass. 526 (2008) (addressing method for calculating overtime rate for employees earning prevailing wages). Overtime premiums must be calculated *in addition to* the prevailing wage and cannot be used to offset prevailing wage obligations. *Id*. An employer's obligation to provide overtime compensation is discussed in Section V. As set forth therein, there are significant differences between Massachusetts and federal law regarding the method of calculating the regular rate for employees who are paid at more than one rate during a single week.

[328] M.G.L. ch. 149, § 26.

[329] *Id.*

[330] M.G.L. ch. 149, § 27F.

[331] M.G.L. ch. 149, § 27G.

[332] M.G.L. ch. 149, § 27H. While other sections of the Massachusetts prevailing wage laws apply to contracts with the Commonwealth of Massachusetts or any of its subdivisions, including counties and municipalities, Section 27H applies only to buildings owned or rented by the Commonwealth. The MBTA is not considered to be part of the Commonwealth for purposes of Section 27H. *SEIU v. MBTA*, No. 88-7299 (Mass. Super. Ct. 1990).

[333] M.G.L. ch. 149, § 27D.

[334] DLS, *Topical Outline of Massachusetts Prevailing Wage Law*, at 60 (Jan. 2014), available at http://www.mass.gov/lwd/docs/dos/prevaling-wage/interim-topical-outline.pdf (last visited Jan. 11, 2017).

interpreted, and Massachusetts courts look to the functions ordinarily performed by local public works departments in determining the type of activities that are covered.[335]

Massachusetts sets distinct prevailing wage rates for public construction work in each municipality and requires the "awarding authority" for the contract to obtain a list of applicable rates from the DLS before the project begins.[336] Those rates—which are individualized for each type of job (including type of equipment being operated) that could potentially be needed on the project—must then become a part of the contract.[337] The DLS is required to look to the rates established in collective bargaining agreements or other understandings between employers and organized labor for the type of work performed in setting prevailing wage rates (or to private agreements, if no such collective bargaining agreements exist).[338] Courts give effect to the DLS's rate-setting unless it is found arbitrary and capricious.[339]

Under Massachusetts law, the prevailing wage rate includes certain fringe benefits.[340] Employers choosing to provide fringe benefits may take a credit against the prevailing wage rate for the amount of their benefit contributions, up to the amount established by DLS in the rate-setting process.[341] For construction work, Massachusetts law allows employers to take credit for "contributions to health/welfare, pension, annuity or supplemental unemployment insurance plans."[342] Employers cannot take credit for the value of vacation or sick leave.[343]

Employers are only required to pay their employees prevailing wages for time actually spent on a prevailing wage project, not for all hours they work.[344] Travel time may be subject to the Prevailing Wage Statute depending on the type of work being performed.[345] Waiting time—

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[335] *See Commonwealth v. W. Barrington Co.*, 5 Mass. App. Ct. 416, 419, 363 N.E.2d 1120 (1977) (street sweeping covered by M.G.L. ch. 149, § 27F).

[336] M.G.L. ch. 149, § 27, 27F; *see George v. Nat'l Water Main Cleaning Co.*, 2013 WL 5205846, at *2 (D. Mass. Sept. 16, 2013).

[337] M.G.L. ch. 149, § 27, 27F.

[338] M.G.L. ch. 149, § 26 ("in any of the towns where the works are to be constructed, a wage rate or wage rates have been established in certain trades and occupations by collective agreements or understandings in the private construction industry between organized labor and employers, the rate or rates to be paid on said works shall not be less than the rates so established").

[339] *George*, 2013 WL 5205846, at *7.

[340] *Id.* (Payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans under collective bargaining agreements or understandings between organized labor and employers shall be included for the purpose of establishing minimum wage rates as herein provided.).

[341] DLS, *Topical Outline of Massachusetts Prevailing Wage Law*, at 20-21 (Jan. 2014).

[342] M.G.L. ch. 149, § 27.

[343] *See* DLS Opinion Letter PW-2009-09 (Nov. 25, 2009) ("[E]mployer deductions from prevailing wages, pursuant to c. 149, §§ 26 and 27, may not include holiday, vacation or sick pay."), available at http://www.mass.gov/lwd/labor-standards/prevailing-wage-program/opinion-letters/2009/pw-2009-09-112509.html (last visited Jan. 11, 2017).

[344] *See Teamsters Joint Council No. 10 v. Dir. of Dep't of Labor & Workforce Dev.*, 447 Mass. 100, 111, (2006).

[345] *George*, 2013 WL 5205846, at *12 (time spent traveling between catch basins and to/from waste collection facilities is subject to Prevailing Wage Statute because it is part of 27F job site, whereas time spent traveling to first catch basin at the beginning of day, and from catch basis or waste collection facility at end of day, is not subject to Prevailing Wage Statute).

including time spent waiting outside the borders of the construction project in some instances—may also need to be paid at prevailing rates.[346]

Covered employers must post the prevailing wage rates in a conspicuous location at the work site.[347] Certified payroll records must be submitted to the awarding authority of construction projects on a weekly basis.[348]

2. Operation of Equipment in Public Works in Massachusetts

Operation of "a truck or automotive or other vehicle or equipment . . . engaged in public works" also requires payment of prevailing wages set by the DLS, even if the job does not involve "construction."[349] Although this statute does not expressly require the DLS to follow the procedures for determining prevailing wage rates in the construction context in setting non-construction rates, the DLS generally does follow those procedures, and one federal court in Massachusetts has noted that this "framework lays out the fundamental policy decisions that constrain" application of the non-construction statute.[350]

For non-construction prevailing wage work that falls under this provision, employers can only take credit for contributions to health and welfare plans and life and disability insurance, but not for pension or insurance benefits.[351] The certified payroll requirement, however, by its express terms applies only to construction work.

3. Other Prevailing Wage Provisions in Massachusetts

As described above, Massachusetts prevailing wage requirements also apply to contracts to move office furniture and to clean certain public buildings.[352] The term "office furniture" has been interpreted by the DLS to exclude school room furniture.[353] The provision regarding cleaning of public buildings also rarely applies in Massachusetts schools because it covers only the cleaning of buildings owned or rented by "the commonwealth," and not buildings belonging to municipalities.[354] Neither statutory provision includes a certified payroll requirement.[355]

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[346] *Kuehl v. D&R Paving, LLC*, 2011 Mass. Super. LEXIS 70, at *11 (Mass. Super. Ct. May 6, 2011) (holding that drivers delivering asphalt and other materials to construction site were required to be paid for time spent waiting in area directly adjacent to site because the time "serve[ed] the project's important interests in continuous operations and avoidance of delay while waiting for deliveries").

[347] M.G.L. ch. 149, § 27.

[348] M.G.L. ch. 149, § 27B.

[349] M.G.L. ch. 149, § 27F.

[350] *George*, 2013 WL 5205846, at *6.

[351] *Id.*; *see also* DLS, *Topical Outline of Massachusetts Prevailing Wage Law*, at 56 (Jan. 2014).

[352] Several other statutes also incorporate prevailing wage requirements. Bus drivers must be paid prevailing wages pursuant to M.G.L. ch. 71, § 7A. Likewise, public housing authorities must pay prevailing wages pursuant to M.G.L. ch. 121, § 29, which expressly incorporates the provisions of M.G.L. ch. 149, § 26.

[353] M.G.L. ch. 149, § 27H; DLS, *Topical Outline of Massachusetts Prevailing Wage Law*, at 59 (Jan. 2014).

[354] M.G.L. ch. 149, § 27H; DLS, *Topical Outline of Massachusetts Prevailing Wage Law*, at 61 (Jan. 2014).

Employers of employees who move office furniture pursuant to a contract with the Commonwealth or a municipality cannot take credit for pension benefits paid to those employees, while employers of employees who clean public buildings can take credit for such benefits.[356]

4. Davis-Bacon and Related Acts

The federal prevailing wage rate for construction is governed by the Davis-Bacon and Related Acts (DBRA).[357] The Davis-Bacon Act requires that all contractors and subcontractors that perform work on federal contracts worth over $2,000 for the construction, alteration, or repair of public buildings or public works must pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits for corresponding classes of laborers and mechanics employed on similar projects in the same geographic area.[358] Dozens of "Related Acts" extend the Davis-Bacon Act's prevailing wage rates to laborers and mechanics working on certain federally-assisted (e.g., grants, loans, loan guarantees) construction. The prevailing wage rates and fringe benefit rates for these projects are determined by the Wage and Hour Division of the DOL.[359] Employers subject to the DBRA must post the scale of wages in a prominent and easily accessible place at the work site.[360]

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.[361] Federal overtime requirements are contained in the FLSA.[362] 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.[363] Massachusetts employers must apply whichever law provides the greatest protection for their employees.[364]

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[355] M.G.L. ch. 149, § 27H; M.G.L. ch. 149, § 27G.

[356] M.G.L. ch. 149, § 27H; M.G.L. ch. 149, § 27G.

[357] 40 U.S.C. § 3142.

[358] *Id.*

[359] *Id.* Under the DBRA, fringe benefits include life insurance, health insurance, pension payments, vacation, holidays, sick leave, and other "bona fide" fringe benefits. 29 C.F.R. § 5.23.

[360] 40 U.S.C. § 3142.

[361] 29 U.S.C. § 207(a)(1); M.G.L. ch. 151, § 1A. Unlike some jurisdictions, neither Massachusetts nor federal law requires daily overtime pay when an employee works *more than eight hours in one day*. Employers are only obligated to pay overtime when a covered employee works more than *forty hours in a given workweek* regardless of how many hours were worked on any particular day.

[362] 29 U.S.C. § 207.

[363] M.G.L. ch. 151.

[364] This may apply to the damages provisions as well as the substantive requirements of the laws. A U.S. district court recently concluded that a plaintiff entitled to overtime pursuant to the FLSA but not Massachusetts law was entitled to treble damages and attorneys' fees pursuant to the Massachusetts Wage Act. *Lambirth v. Advanced Auto, Inc.*, 140 F. Supp. 3d 108, 111-12 (D. Mass. 2015) (denying defendant's motion to dismiss Wage Act claim, noting that Wage Act "applies to untimely payment of all wages to which an employee is entitled under either state or federal law").

The following section focuses on how to calculate the overtime rate for "non-exempt" employees (i.e., those employees covered by the overtime provisions of the FLSA or the Massachusetts Minimum Fair Wage Law).[365] Although the overtime requirements apply to a large number of employees, there are significant exceptions to the overtime pay requirements, which are discussed in Section VI.

A. Calculation of the Regular Rate of Pay

As explained above, overtime must be paid at a minimum of one and one-half times the employee's "regular rate of pay."[366] Accordingly, it is important for an employer to understand what constitutes an employee's "regular rate" and to know how to calculate this rate properly. The "regular rate of pay" is the amount of compensation that an employee receives for a typical hour of the workweek.[367] For employees paid on an hourly basis, the regular rate of pay generally is their hourly rate. For employees who are paid on a basis other than an hourly rate (e.g., fixed salary or piece rate), the regular rate of pay is generally determined by dividing the employee's total earnings for the week by the total number of hours worked during that week.[368]

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. Compensation Included in the Calculation of the Regular Rate of Pay Under Federal Law

To determine the amount of an employee's pay for calculating overtime, federal law provides that the regular rate of pay shall include the following types of remuneration:

- Compensation received by an employee, including hourly pay, piece rate pay, commissions, salary, and other compensation items, such as board, lodging, and use of facilities

- Shift and weekend differentials

[365] This section addresses the calculation of the regular rate for purpose of paying overtime for hours in excess of forty per workweek. One issue that arises in litigation, however, is whether an employee worked any overtime without pay and whether the employer had actual or constructive knowledge that the employee was working the overtime. *See, e.g., Vitali v. Reit Mgmt. & Research, LLC*, 88 Mass. App. Ct. 99, 111 (2015) (reversing summary judgment in favor of employer due to factual dispute about whether employer knew or should have known that plaintiff did not take her full lunch breaks even though plaintiff failed to comply with work reporting procedures, noting that alleged work was done at plaintiff's cubicle as opposed to off site and that employers bear the responsibility for ensuring time sheets are accurate).

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

[367] 454 C.M.R. § 27.03; 29 U.S.C. § 207(e).

[368] 454 C.M.R. § 27.03; 29 C.F.R. § 778.200-778.225.

- On-call pay
- Longevity pay (i.e., extra pay for seniority)
- Payments for "sold back" benefits, such as sick leave pay, if the sale is during employment rather than a benefit paid upon termination of employment
- Travel and employee lunch or meal expenses paid by the employer, *unless* the expenses are incurred for the employer's benefit (e.g., meals provided to employees while working late or meal expenses provided to employees while out of town on business)
- Annual lump sum payments to employees working unfavorable schedules
- Supplemental disability payments made to partially disabled employees when reassigned to lower wage jobs
- Certain stock option compensation
- Safety, incentive, productivity, attendance, and merit bonuses, *unless* the bonus is completely discretionary
- Certain premium payments made by employers for work in excess of or outside of specified daily or weekly standard work periods or on certain special days[369]

2. Compensation Excluded from the Calculation of the Regular Rate of Pay Under Federal Law

Federal law specifically excludes the following from the calculation of an employee's regular rate of pay:

- Sums paid as gifts, including Christmas gifts, that are not regular and expected
- Pay for certain idle hours (e.g., holidays, vacation, illness, bereavement, jury duty, and disaster relief)
- Reimbursement for expenses
- Purely discretionary bonuses
- Severance pay
- Death benefits

[369] 29 U.S.C. § 207(e); 29 C.F.R. §§ 778.200-778.225.

- Reasonable uniform allowances
- Tuition reimbursement
- Call-in and call-back guarantees for hours in excess of hours actually worked
- Employer contributions to bona fide profit sharing plans
- Exercised stock option grants
- Employer-paid disability benefits, medical care, retirement benefits, workers' compensation, and other employer-paid health and welfare contributions, including insurance premiums
- Overtime premium payments[370]

3. Additional Compensation Excluded from the Calculation of the Regular Rate of Pay Under Massachusetts Law

Massachusetts law specifically excludes from the regular rate of pay everything that is excluded under federal law, plus some additional types of remuneration. The applicable Massachusetts statute provides that the regular hourly rate shall exclude sums paid as:

- Commissions
- Drawing accounts
- Bonuses
- Other incentive pay based on sales or production[371]

4. Determining Whether to Apply the Massachusetts or Federal Calculation of the Regular Rate

The regular rate for most hourly employees and many salaried non-exempt employees will be the same under Massachusetts and federal law. However, for some employees, such as commissioned employees, the Massachusetts regular rate will be less than the federal rate because of the additional exclusions allowed under Massachusetts law. To determine whether to apply the state or federal regular rate calculation for a specific employee, an employer must first determine whether the employee is exempt under Massachusetts law or the FLSA, or both. These exemptions are discussed in detail in Section VI.

[370] 29 U.S.C. § 207(e); 29 C.F.R. §§ 778.200-778.225.

[371] M.G.L. ch. 151, § 1A.

- If an employee is exempt under the FLSA but not Massachusetts law, apply the Massachusetts calculation of the regular rate.

- If the employee is exempt under Massachusetts law but not under the FLSA, apply the FLSA calculation of the regular rate.

- If the employee is not exempt under either the FLSA or Massachusetts law, apply the calculation most beneficial to the employee, which will generally be the FLSA calculation.

5. Calculation of the Regular Rate for an Hourly Employee

Assuming an hourly employee receives no additional compensation, the employee's hourly rate will constitute his or her regular rate for purposes of overtime payments.

> Example: An employee's hourly pay, thus regular rate, is $12.00 per hour. The employee's overtime rate is $18.00 per hour (1.5 x $12.00 regular rate = $18.00 per hour). If the employee works 50 hours in a week, the employee would be paid $660.00 for the week – $480.00 regular pay ($12.00 x 40 hours), plus $180.00 overtime pay ($18.00 x 10 hours).

6. Calculation of the Regular Rate for an Employee Paid on a Commission Basis Only

Because commissions generally may be excluded from an employee's regular rate of pay under Massachusetts law, calculating regular and overtime rates for employees paid on a 100 percent commission basis can be problematic. The DLS (the entity that administers the Massachusetts overtime law) addressed this issue in a 2003 opinion letter.[372] Under the guidance of that opinion letter, commission-only employees must receive total compensation for each week of work that equals or exceeds what they would earn if they were paid hourly at the minimum wage rate. In other words, such employees must receive at least the sum of the hours they worked up to forty hours per week multiplied by the minimum wage rate, plus the sum of all overtime hours multiplied by one and one-half times the minimum wage rate. As long as that minimum threshold is met, the Massachusetts minimum wage and overtime pay requirements are satisfied. This is true even where the compensation received for the week is treated as a "draw" on future commissions.[373] Note, however, that where the commission-only employee is *not* exempt from federal overtime pay requirements, the federal regular rate calculation will apply and commissions will need to be included in the employee's regular rate.

[372] DLS Opinion Letter MW-2003-004 (Mar. 14, 2003).

[373] *Id.*

7. Calculation of the Regular Rate When a Bonus Is Included in the Rate

Massachusetts law excludes bonuses in determining an employee's regular rate. Under the FLSA, however, non-discretionary bonuses must be included in an employee's regular rate.[374] To calculate the effect of the bonus on the employee's regular rate, an employer must first determine the period of time the bonus is intended to cover.[375] If a bonus covers only one week, the regular rate for that week is calculated by adding the bonus to the employee's other compensation for the week and dividing the total by the number of hours the employee worked.

When a bonus plan calls for calculation of bonuses over a period longer than a week, the employer can disregard the bonus in computing the employee's regular rate until such time as the bonus can be calculated. In the interim, the employer must pay overtime based on the employee's hourly rate. Once the bonus can be ascertained, the employer must then apportion the bonus to the weeks during which it was earned. The employee will then be entitled to an additional overtime payment of one-half times the hourly rate of pay allocated to the bonus multiplied by the number of overtime hours worked that week.[376] If the bonus earnings cannot be identified with particular workweeks, the employer can use another reasonable and equitable method to allocate the bonus (such as dividing the bonus equally among each of the weeks of the period to which it relates or dividing the bonus in proportion to the hours worked each week of that period).[377]

> Example: Under an employer's bonus plan, an employee is entitled to a non-discretionary $1,000 monthly bonus if the employee meets certain performance goals. The employee meets those goals in a month in which the employee worked 50 hours in each of the four weeks of that month. The bonus would be allocated to each of the four weeks by dividing the $1,000 bonus by 4 (corresponding to the four workweeks in the period) to determine the amount of the bonus allocable to each week. In this case, the amount would be $250.00. The employee's overtime could be calculated by either of two methods, both of which result in the same total compensation:
>
> Method 1: The employee's regular hourly compensation is calculated by multiplying the total hours worked by the employee's regular hourly rate ($20.00 x 50 hours = $1000.00). The bonus allocable to the week is added to the employee's regular hourly compensation ($250.00 + $1000.00 = $1250.00). That total is then divided by the total number of hours worked to obtain an adjusted hourly rate ($1250.00 ÷ 50 hours = $25.00 per hour). The overtime owed to the employee is equal to one-half of that hourly amount multiplied by the number of overtime hours worked by the employee (in this case, 10 hours). Thus, the employee would be owed $75.00 in overtime for each of the four weeks in the

[374] 29 C.F.R. § 778.208.

[375] 29 C.F.R. § 778.209.

[376] 29 C.F.R. § 778.209(a).

[377] 29 C.F.R. § 778.209(b).

bonus period ($25.00 x .5 x 10 = $125.00). The employee's total compensation for each week would be $1375.00 ($1000.00 regular hourly compensation, plus $250.00 in bonus, plus $125.00 in overtime).

Method 2: Alternatively, the employer may calculate the employee's straight-time pay and overtime as it ordinarily would, that is, by multiplying the regular hourly rate by 40 hours to obtain the employee's straight-time pay ($20.00 x 40 hours = $800.00), and by multiplying the employee's overtime hours by 1.5 times the employee's regular rate to obtain the employee's regular overtime pay ($20.00 hour x 1.5 x 10 hours = $300.00). Additional overtime allocable to the bonus would then be calculated by dividing the bonus by the total number of hours worked each week ($250.00 ÷ 50 hours = $5.00), then multiplying that amount by .5, and then multiplying that by the number of overtime hours ($5.00 x .5 x 10 hours = $25.00). The employee's total compensation would be $1375.00 ($800.00 straight-time regular compensation, plus $300.00 regular overtime, plus $250.00 in bonus, plus $25.00 in overtime pay allocable to the bonus).

8. Calculation of the Regular Rate for an Employee Paid by a Method Other Than an Hourly Rate

a. Piecework

An employee who is paid on the basis of a piece rate for work performed is entitled to overtime under both Massachusetts and federal law. The regular rate for piecework can be computed in either of two ways:

Method 1: The regular rate may be determined by dividing the total weekly earnings by the total weekly hours worked.[378]

Method 2: The regular rate may be the same as the straight-time piece rates in effect during overtime hours, provided that (1) the employee consents; (2) the piece rate is bona fide; and (3) the employee receives one and one-half times this piece rate for overtime hours worked.[379]

Example Method 1: An employee's straight-time workweek is 40 hours. The employee works 45 hours and receives total earnings of $900.00. The employee's regular rate is $20.00 per hour ($900.00 ÷ 45 hours = $20.00 per hour). Thus, for the 5 overtime hours worked, the employee is entitled to an additional $50.00 dollars (.5 x $20.00 per hour x 5 hours = $50.00). The employee's weekly wage is $950.00.

[378] 29 C.F.R. § 778.111.

[379] 29 C.F.R. § 778.418.

Example Method 2: An employee who regularly receives $20.00 per piece of completed work would be entitled to $30.00 per piece of work finished during the overtime hours (1.5 x $20.00 per piece = $30.00 per piece).

b. Day Rates and Job Rates

An employer may pay an employee a flat sum for a day's work or for performing a particular job without regard to the number of hours worked in the day or at the job. If an employer pays an employee based on a job or day rate, the employee's regular rate is determined by adding all of the day rates or job rates paid during the workweek and dividing the sum by the total number of hours worked in that workweek.[380] The employee must then be paid one-half of the regular rate for all hours worked over forty in the workweek.[381]

Example: An employee for a housekeeping service company is compensated based on a job rate of $100.00 for every house cleaned. In one week, the employee cleans 9 houses, and spends 5 hours cleaning each house. The employee's regular rate is calculated by dividing the total compensation received for the week, in this case, $900.00 ($100.00 per house x 9 houses = $900.00), by the total number of hours worked, in this case, 45 hours. Thus, the employee's regular rate would be $20.00 per hour ($900.00 ÷ 45 hours = $20.00), and the employee would be entitled to an additional $50.00 of overtime pay (.5 x $20.00 x 5 hours).

c. Semi-Monthly or Monthly Salary

An employee's regular rate of pay is based on pay for a work*week*. Thus, where an employee is paid a salary on a monthly or semi-monthly basis, an employer must first determine what the employee's weekly salary would be. For an employee paid on a semi-monthly basis, the employee's weekly salary is determined by multiplying the employee's semi-monthly salary by 24 (the number of semi-monthly periods in a year), and then dividing that number by 52 (the number of weeks in a year).[382] For an employee paid on a monthly basis, the employee's weekly salary is determined by multiplying his or her monthly salary by 12 (the number of months in a year), and then dividing that number by 52 (the number of weeks per year).[383] To determine the employee's regular rate, an employer must then divide the weekly salary by the number of hours in a regular workweek.[384]

Example 1: An employee is paid on a semi-monthly basis and receives $1,600 each pay period. The employee's regular workweek is 35 hours, and the

[380] 29 C.F.R. § 778.112.

[381] *Id.*

[382] 29 C.F.R. § 778.113(b).

[383] *Id.*

[384] *Id.*

employee and employer have agreed that the salary is intended to cover only those 35 hours. In one week, he works 45 hours. To calculate the employee's regular rate, the semi-monthly pay must be multiplied by 24 to find the employee's annual salary ($1,600 x 24 = $38,400). That annual salary must then be divided by 52, the number of weeks in a year ($38,400 ÷ 52 = $738.46). The employee's regular rate is that weekly salary divided by the number of hours in a regular workweek ($738.46 ÷ 35 = $21.09 per hour). The employee would be entitled to an additional $263.60 – $105.45 of additional straight-time compensation ($21.09 x 5 hours), plus an additional $158.15 for the employee's overtime hours (1.5 x $21.09 x 5 hours).

Example 2: An employee is paid on a monthly basis and receives $2,080 each month. The employee's regular workweek is 40 hours. In one week, the employee works 45 hours. To calculate the regular rate, the semi-monthly pay must be multiplied by 12 to find the employee's annual salary ($2,080 x 12 = $24,960). That annual salary must then be divided by 52 ($24,960 ÷ 52 = $480.00). The employee's regular rate is that weekly salary divided by the number of hours worked in a regular week ($480.00 ÷ 40 = $12.00 per hour). The employee would be entitled to $90.00 of overtime (1.5 x $12.00 x 5 hours).

9. Calculation of the Regular Rate Using the Fluctuating Workweek Method (FWW)

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), regardless of the number of hours the employee actually works, provided that the following conditions are satisfied:[385]

- The employer and employee have a "clear and mutual understanding," preferably in writing, that the employee will receive a fixed amount *regardless of how many hours the employee actually works in a workweek* (this includes both weeks in which the employee works more than forty hours per week and weeks in which the employee works less than forty hours per week).

- The hours that an employee works per week must fluctuate.

- The employee must be paid an additional one-half of his or her regular hourly rate for all hours worked over forty (this takes into account the fact that the employee has already been compensated for all hours worked at straight-time).

[385] 29 C.F.R. § 778.114. While no Massachusetts statute or regulation directly addresses this method of calculating overtime, both the SJC and the First Circuit have recognized that the fluctuating workweek method is permissible under Massachusetts law. *See Valerio v. Putnam Assocs., Inc.*, 173 F.3d 35 (1st Cir. 1999); *Goodrow v. Lane Bryant, Inc.*, 432 Mass. 165, 732 N.E.2d 289 (2000).

- The salary is sufficient to provide no less than the minimum wage for each hour worked.[386]

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.[387] 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.[388] 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). Under a fluctuating workweek method, the more hours worked, the lower the regular rate and, thus, the overtime premium will be.

> Example 1: An employee is paid $1200 per week and works 50 hours. The employee's regular rate is $24.00, which is calculated by dividing the $1200 weekly salary by the total number of hours worked ($1200 ÷ 50 = $24.00 per hour). The employee would be entitled to $120.00 of overtime pay (.5 x $24.00 x 10 overtime hours), or $12.00 per each hour of overtime.

> Example 2: An employee is paid $1200 per week and works 60 hours. The employee's regular rate is $20.00, which is calculated by dividing the $1200 weekly salary by the total number of hours worked ($1200 ÷ 60 = $20.00 per hour). The employee would be entitled to $200.00 of overtime pay (.5 x $20.00 x 20 overtime hours), or $10.00 per each hour of overtime.

The employer bears the burden of demonstrating the existence of a clear and mutual understanding regarding how overtime will be calculated. Hence, the best practice for an employer is to have the employee sign a written agreement that describes the fluctuating workweek method in clear and unambiguous terms prior to paying the employee pursuant to this method. However, at least some courts have held that the requisite "clear and mutual understanding" may be established in the absence of a written agreement by the employee's

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[386] 29 C.F.R. § 778.114.

[387] *Id.* In 2011, the DOL rejected proposed regulations that would have clarified what constitutes a "fixed salary" for purposes of the fluctuating workweek method of payment. The regulations would have permitted employers to pay bonuses and premiums to employers whose pay is calculated using this method. In rejecting this proposed regulatory change, the DOL stated that it believed that bonuses—particularly those tied to an employee's hours of work—are inconsistent with the fluctuating workweek. *Updating Regulations Issued Under the Fair Labor Standards Act*, 76 Fed. Reg. 18,832, 18,848-18,850 (Apr. 5, 2011). In a 2016 decision, *Lalli v. General Nutrition Centers*, 814 F.3d 1 (1st Cir. 2016), the First Circuit rejected the DOL's position and approved the use of the FWW method where commissions are paid as part of an employee's compensation. The First Circuit concluded that "the payment of a performance-based commission does not foreclose the application of section 778.114 [the FWW regulation] with respect to the salary portion of the pay structure at issue." *Lalli*, 814 F.3d at 4. The court thus distinguished performance-based commissions from hours-based bonuses (such as shift differentials), which offend the FWW's "fixed salary" requirement. *Id.* at 8. *Lalli* is the only appellate decision addressing whether performance-based commissions are compatible with the FWW method of pay.

[388] 29 C.F.R. § 778.114.

acceptance of the same salary each week.[389] In addition, the employer should be cognizant that this method of compensation is administratively complex and potentially burdensome. Given the complexities, the employer should seek the advice of legal counsel prior to implementing a fluctuating workweek method for overtime compensation.[390]

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

Under federal law,[391] 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. As with the FWW method, the best practice is to have an employee sign a written agreement that describes the fixed salary method in clear and unambiguous terms prior to paying the employee pursuant to this method.

The DOL provides the following example:[392] "If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of $275 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of $2.50 per hour (half-time) in addition to his salary, and to statutory overtime pay of $7.50 per hour (time and one-half) for any hours worked in excess of 55."[393] The employee's "regular rate in any overtime week of 55 hours

[389] Several circuit courts and the DOL have also approved use of the FWW as a method to calculate back wages in exempt status misclassification cases where the employee had a clear understanding that he or she would be paid a salary and would not receive overtime for hours over forty. *See Ransom v. M. Patel Enters., Inc.*, 734 F.3d 377, 386 n.14 (5th Cir. 2013); *Desmond v. PNGI Charles Town Gaming*, 630 F.3d 351 (4th Cir. 2011); *Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 671 (7th Cir. 2010); *Clements v. Serco*, 530 F.3d 1224, 1230-31 (10th Cir. 2008); *Valerio v. Putnam Assocs.*, 173 F.3d 35 (1st Cir. 1999); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135 (5th Cir. 1988); DOL Opinion Letter 2009-3 (Jan. 14, 2009). Other circuit courts have not addressed the issue, however, and some district courts have rejected the computation of back wages in misclassification cases based on the half-time (FWW or fixed salary) method. *See, e.g., Costello v. Home Depot USA, Inc.*, 944 F. Supp. 2d 199, 202-08 (D. Conn. 2013); *Hasan v. GPM Invs., LLC*, 896 F. Supp. 2d 145 (D. Conn. 2012).

[390] The FLSA contains provisions for an additional alternative method of calculating overtime—the Belo plan. Named after a U.S. Supreme Court decision involving the A.H. Belo Corporation, this plan is used when an employer wishes to assure a constant weekly salary to employees whose work has inherently irregular hours. *See Walling v. A.H. Belo Corp.*, 316 U.S. 624, 62 S. Ct. 1223, 86 L.Ed. 1716 (1942). It is sanctioned by the FLSA and allows employers to compensate employees for overtime with a fixed wage where the nature of the work performed necessitates irregular hours of work and there are significant variations in weekly hours of work both above and below forty hours per week. *See* 29 C.F.R. §§ 778.400-778.414. Employers that use the Belo plan must pay a fixed, guaranteed weekly wage which consists of the employee's regular rate plus a predetermined amount of overtime at the FLSA rate. *Id.* This method is very complex and its use is even more restrictive than the FWW method. The Massachusetts legislature has not specifically adopted the Belo plan method of calculating overtime, and no Massachusetts courts have yet addressed whether this method would be acceptable under the Massachusetts Minimum Fair Wage Law.

[391] Massachusetts law is silent as to whether the fixed salary method is available under Massachusetts law. The applicable Massachusetts regulation, 454 C.M.R. § 27.03(3), explicitly approves the FWW method but does not address the fixed salary method. We recommend consulting with legal counsel to determine the availability of this method in Massachusetts.

[392] Although this example is helpful, the salary would not be lawful in Massachusetts because it results in the employee being paid less than the minimum wage for each hour worked.

[393] 29 C.F.R. § 778.325.

or less is determined by dividing the salary by the number of hours worked to earn it in that particular week, and additional half-time, based on that rate, is due for each hour in excess of 40."[394]

When an employee works *fewer than* the specified number of hours in a given week, the fixed salary method allows an employer to compute an employee's pay for that week in one of three ways:

- Method 1: Add salary plus half-time OT premium (salary divided by *the specified number of hours*, then divided by 2) for each hour worked from hours 40 to the specified number of hours, then subtract the hourly rate (salary divided by specified number of hours) for each hour below (i.e., short of) the specified number of hours.[395]

- Method 2: Add salary plus half-time OT premium (salary divided by *actual number of hours worked*, up to maximum of specified number, then divided by 2) for each hour worked from hours 40 to the specified number of hours.

- Method 3: Add salary plus half-time OT premium (salary divided by *40*, then divided by 2) for each hour worked from hours 40 to the specified number of hours.[396]

Examples of these calculation methods, assuming a salary of $700 for 50 hours, and 45 hours worked in the week, are:

- Method 1: $700 [salary] + ($7*5) [($700/50)/2 * OT Hours] - ($14*5) [$700/50 * (50-45)] = $665.00

- Method 2: $700 [salary] + ($7.78*5) [($700/45)/2 * OT Hours] = $738.90

- Method 3: $700 [salary] + ($8.75*5) [($700/40)/2 * OT Hours] = $743.75

When an employee works *more than* the specified number of hours in a given week, the employee must be paid one and one-half times regular rate for every hour worked over the specified number of hours.

[394] *Id.*

[395] *See* 29 C.F.R. 778.325 ("This assumes that when an employee works less than 50 hours in a particular week, deductions are made at a rate of $5.50 per hour for the hours not worked.").

[396] The DOL has not explicitly approved this method. Its Field Operations Handbook, however, permits the use of a forty-hour half-time for FWW employees. *See* WHD Field Operations Handbook 32b04b(a). Although the DOL has not made a similar pronouncement with respect to employees paid a salary for a fixed number of hours, the underlying logic would appear to permit such a calculation.

The determination of which method is most appropriate depends on business decisions and the ability to monitor compliance. Method 1 is a salary in name only. When the hours worked are fewer than the specified number of hours, the "salary" is reduced by the regular rate per hour. If the goal is a true "salary" for the set number of hours, Method 1 does not serve that goal. Method 2 provides a true salary, but requires recalculation of the regular rate of pay on a weekly basis. Method 3 does not require recalculation and thus avoids the administrative burden associated with recalculation, but it results in additional expense due to the higher regular rate. Method 3 also carries some risk due to the fact that the DOL has not specifically opined on the issue.

11. 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.[397]

> Example: An employee works for a furniture store that pays its warehouse employees $20.00 per hour and its showroom employees $15.00 per hour. In one week, the employee works in the warehouse for 30 hours and in the showroom for 20 hours.
>
> The employee's regular rate is determined by multiplying the 30 hours worked in the warehouse by the warehouse rate of $20.00 (30 x $20.00 per hour = $600.00) and the 20 hours worked in the showroom by the showroom rate of $15.00 (20 x $15.00 per hour = $300.00) and then dividing the sum of these numbers, $900.00 ($600.00 + $300.00), by the employee's total hours for the week, in this case 50 hours. Thus, the employee's regular rate for purposes of calculating overtime is $18.00 per hour ($900.00 ÷ 50 hours) and the employee is owed additional compensation at a rate of $9.00 (.5 x $18.00) for each hour over 40 hours. Here, the employee's total compensation for the week would be $990.00 – $900.00 in regular pay, plus $90.00 in overtime ($9.00 x 10 hours).

B. Sunday and Holiday Overtime Pay Requirements

Massachusetts law requires that retail businesses employing more than seven employees must compensate non-exempt employees at a rate not less than one and one-half times their regular rate for all hours worked on Sunday and certain holidays.[398] Under both Massachusetts and federal

[397] *See* DLS Opinion Letter MW-2001-014 (Nov. 27, 2001). Under Massachusetts law, the only approved method for calculating regular rate for employees working at two or more rates is the weighted average approach described in the text. *Id.* *See also* DLS Opinion Letter MW-2002-003 (Jan. 25, 2002). Federal law and several other states allow for an alternative method, in which the rate in effect at the time that overtime is worked may be used as the regular rate, provided that the employee and employer agree to that method prior to the time the work is performed. 29 C.F.R. § 778.415. Massachusetts does not allow this method. *See supra* note 390.

[398] M.G.L. ch. 136, § 6(50) (requiring premium pay on Sundays); M.G.L. ch. 136, § 13 (extending premium pay obligations to New Year's Day, Columbus Day, and Veterans Day); M.G.L. ch. 136, § 16 (extending premium pay obligations to Memorial Day,

law, retail employers may credit Sunday and holiday premium payments toward weekly overtime payments.[399]

> Example: A retail employee works 8 hours a day, Sunday through Friday, for a total of 48 hours in one week. Where the workweek runs from Sunday to Saturday the retail employer must pay the employee at one and one-half times the employee's regular rate for the 8 hours worked on Sunday, this payment will satisfy both the Sunday premium pay and overtime pay requirements for that workweek.

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.[400] To be exempt from overtime under state *and* federal law, an employee must fall within *both* a Massachusetts and federal exemption. While Massachusetts has specifically adopted some federal exemptions, including the so-called "white collar" exemptions, and Massachusetts courts and the DLS have looked to federal law for guidance when interpreting Massachusetts exemptions, the state and federal exemptions are not identical. Therefore, employers must ensure that employees treated as exempt satisfy the requirements of both a state and federal exemption. If an employee falls under an exemption that exists only under state law or only under federal law, but not both, the employer should not simply assume that the employee must be paid overtime—an employee may fall under one particular state exemption and a different federal exemption. For example, a sales employee working for a hotel may fall within the FLSA's commissioned inside sales exemption, which does not exist under Massachusetts law, and the state hotel exemption, which exists under Massachusetts but not federal law.[401]

Determining exempt status can be a difficult task and requires a fact-specific examination of the duties of each individual employee who could potentially qualify as exempt. An employee's "job title [or a particular job classification] alone is insufficient to establish the exempt status of an

Labor Day, and Independence Day). See Section I.B for a detailed discussion of the Massachusetts laws governing Sunday and holiday premium pay requirements.

[399] M.G.L. ch. 151, § 1A. *See also Swift v. Autozone, Inc.*, 441 Mass. 443, 806 N.E.2d 95 (2004). If an employer pays holiday pay for a set number of hours to its employees, those hours are not considered to be hours worked for purposes of calculating overtime. *See* DLS Opinion Letter MW-2002-018 (June 5, 2002).

[400] 29 U.S.C. § 213; M.G.L. ch. 151, § 1A.

[401] The federal inside sales exemption, 29 U.S.C. § 207(i), is discussed further in Section VI.B.2, and the Massachusetts hotel exemption, M.G.L. ch. 151, § 1A(12), is discussed in Section VI.B.5.

employee."[402] The FLSA includes some exemptions to the overtime laws that are outside of this publication's Massachusetts law focus.[403]

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.[404] The executive, administrative, and professional exemptions are typically referred to as the "white collar exemptions." While both Massachusetts and federal law exempt other categories of employees from overtime, the white collar exemptions are those on which employers most often rely and therefore are also the exemptions that are most often subject to litigation.

While the Massachusetts Minimum Fair Wage Law includes the white collar exemptions for bona fide executive, administrative, and professional employees,[405] the statute does not provide definitions for these three categories of employees. The Massachusetts minimum wage regulations, however, provide that "[t]he terms 'bona fide executive or administrative or professional person' in [the Massachusetts statute] shall have the same meaning" as those set forth in the federal regulations.[406]

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

1. Be paid at or above a certain compensation level;
2. Be paid on a salary, rather than hourly, basis;[407] and
3. Perform certain exempt duties.[408]

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[402] 29 C.F.R. § 541.2.

[403] For example, the FLSA exempts certain commissioned inside sales employees, agricultural employees, switchboard operators, and limited-circulation newspaper employees from its overtime provisions. *See* 29 U.S.C. § 207(i); 29 U.S.C. § 213(a)(6); 29 U.S.C. § 213(a)(8); 29 U.S.C. § 213(a)(10). Massachusetts law does not contain comparable exemptions.

[404] 29 U.S.C. § 213(a)(1).

[405] M.G.L. ch. 151, § 1A(3).

[406] 454 C.M.R. § 27.03. Additionally, under both Massachusetts and federal law, certain highly compensated individuals who perform at least some of the duties of an administrative, executive, or professional employee are also exempt. 29 C.F.R. § 541.601. The exemption for highly compensated employees is discussed further in Section VI.A.4. Prior to implementation of the regulations, courts still looked to federal law in interpreting this statute. *See Goodrow*, 432 Mass. at 170 (holding that in the absence of statutory definitions of exemptions, "we may look to interpretations of analogous Federal statutes for guidance, . . . but we are not bound by them"); *Vitali v. Reit Mgt. & Research, LLC*, 88 Mass. App. Ct. 99, 103 (2015) ("in interpreting state law, [Massachusetts courts] look to how the FLSA has been construed").

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

[408] 29 C.F.R. § 541.400.

While the first two elements of the test are the same regardless of which white collar exemption an employer applies, with respect to the third element there are separate "duties" tests for each of the executive, administrative, and professional exemptions. The first and second parts of the white collar exemption test (i.e., the level of compensation an employee must earn and the salary basis requirement) are discussed below. The duties tests for each of the white collar exemptions are then addressed separately.

1. Minimum Compensation Requirements

Generally speaking, employees working in an executive, administrative, or professional capacity are exempt from the FLSA's minimum wage and overtime pay requirements if paid a minimum salary (as of the publication date, $455.00 per week or $23,660 annually) on a "salary basis."[409] In 2016, the DOL issued its Final Rule on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees ("DOL's 2016 Final Rule"), which—effective December 1, 2016—was to raise this minimum salary level from $455.00 per week to $913.00 per week ($47,476 annually).[410] On November 22, 2016, however, a federal court in Texas preliminarily enjoined the DOL's 2016 Final Rule from going into effect.[411] On December 1, when the DOL's 2016 Final Rule was to become effective, the DOL filed an intent to appeal the preliminary injunction to the Fifth Circuit Court of Appeals, which subsequently issued an expedited schedule for determining the appeal. For now, the existing salary level ($455.00 per week) is the law. Employers should nevertheless continue to monitor the developments concerning the DOL's 2016 Final Rule to see whether the Fifth Circuit upholds the preliminary injunction, what steps the DOL will take, if any, to revise or rescind the regulations under the new Administration, and whether their wage and hour policies and practices must be updated or otherwise revised to mitigate risks to which the rapidly changing and currently uncertain wage and hour laws give rise.

If an employee makes less than the minimum salary amount, the employee generally cannot qualify as exempt even if he or she meets the other requirements for a white collar exemption. If the employee's salary meets or exceeds this threshold, the employee is exempt *only if* he or she also meets the salary basis test requirements and the duties requirements of one of the white collar exemptions.

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[409] These requirements do not apply to outside sales employees, teachers, certain computer professionals, or employees practicing law or medicine. 29 C.F.R. § 541.500(c); 29 C.F.R. § 541.303(d); 29 C.F.R. § 541.400(b); 29 C.F.R. § 541.304(d). Computer professionals may be paid either $455.00 or more per week on a salary or fee basis or at least $27.63 per hour. 29 C.F.R. § 541.400 (b).

[410] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 99 (May 23, 2016); 29 C.F.R. § 541.600(a). *See also* DOL Wage and Hour Division Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative and Professional Employees (May 2016). Notably, the DOL's 2016 Final Rule does not include any changes to the duties test. *See* 81 Fed. Reg. 99.

[411] *State of Nev. v. U.S. Dep't of Labor*, Civ. Action No. 4:16-CV-000731 (Nov. 22, 2016).

2. Salary Basis Test

An employee is paid on a salary basis if in every pay period the employee receives "a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."[412] An employer may pay an employee additional compensation without losing the exemption if the employment arrangement also includes a guarantee of the minimum weekly required amount on a salary basis.[413] Subject to the exceptions listed below, an exempt employee must receive his or her full salary for *any week* in which the employee performs *any work*, regardless of the number of days or hours worked.[414] An employer does not need to pay an employee for any week in which the employee performs no work. In addition, an employer is not required to pay an exempt employee's full salary in the initial and final weeks of employment; the employer may pay a proportionate part of the full salary for the time actually worked.[415]

a. Deductions from Salary

If an employer makes improper deductions from an employee's predetermined salary, the employee is not considered to have been paid on a salary basis and is therefore no longer exempt.[416] Moreover, where an employer has an "actual practice" of making improper deductions from employees' pay, the exemption may be lost as to all employees in the job classification to which the practice applies and who work for the manager responsible for the improper deductions.[417] For example, if a manager at a particular company facility routinely docks the pay of engineers who otherwise meet the requirements of an exemption for partial-day absences, the exemption for all engineers at that facility whose pay could have been improperly docked would be lost for the time period during which the improper deductions were made. Engineers at other facilities or those who worked for other managers would not be affected and thus would remain exempt.[418]

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[412] 29 C.F.R. § 541.602(a).

[413] For example, an employee may receive a commission of 1 percent on sales and remain exempt as long as the employee is guaranteed at least $455 per week on a salary basis. 29 C.F.R. § 541.604(a); *Guardia v. Clinical Support Options, Inc.*, 25 F. Supp. 3d 152 (D. Mass. 2014).

[414] 29 C.F.R. § 541.604(a). Recently, the First Circuit held that employees were paid on a salary basis even though they were paid under a compensation scheme where "their earnings equaled the number of hours they billed to clients multiplied by an hourly rate between $40 and $60" because they were guaranteed a a minimum weekly salary of $1,000, regardless of hours billed. *Litz v. Saint Consulting Grp Inc.*, 772 F.3d 1, 2-5 (1st Cir. 2014). The plaintiffs argued that this did not constitute payment on a salary basis, citing language on paystubs and several communications from the employer implying that a circumstance could arise where the guarantee would not have been paid. *Id*. at 4-5. The First Circuit held that this argument "simply ignores the economic reality of the guarantee . . . . The fact that the [actual] pay was usually—but not always—high enough to render the guaranteed stipend unnecessary hardly means that the guarantee was not part of the employee's compensation." *Id*. at 5.

[415] 29 C.F.R. § 541.602(b)(6).

[416] 29 C.F.R. § 541.603.

[417] *Id.*

[418] 29 C.F.R. § 541.603(b).

Deductions may not be made from an exempt employee's pay for any absence occasioned by the employer or by the operating requirements of the business.[419] This means that if the employee is ready, willing, and able to work, he or she must be paid. For example, if an exempt employee is told not to come in to work on a particular day because there is no work for the employee to do or because the employer's facility is closed due to inclement weather, the employee must nonetheless be paid for that day.[420] Similarly, an employer may not make deductions for absences occasioned by jury duty, for attendance in a litigation proceeding as a witness, or for temporary military leave.[421] An employer may, however, offset any amount received by an employee as jury fees, witness fees, or military pay for a particular week against the salary due for that week without losing the exemption.[422]

Deductions from salary of less than a week are only permitted in narrow circumstances specifically set forth in the regulations as described below.

(1) Deductions for Disciplinary Reasons

Employers may take deductions from salary for unpaid, full-day disciplinary suspensions imposed for violations of workplace conduct rules, such as sexual harassment policies or policies prohibiting workplace violence.[423] Unpaid disciplinary suspensions are appropriate only where imposed pursuant to a written policy applicable to all employees.[424] This exception is intended to permit employers to apply uniform progressive disciplinary rules to exempt and non-exempt employees and to assist employers in complying with laws that require them to take effective remedial action to address employee misconduct.[425] Importantly, any unpaid disciplinary suspension must be made in full-day increments; deductions for partial-day suspensions are not permitted pursuant to this exception.[426] Employers may also make deductions from an employee's pay as a penalty for violating safety rules of major significance.[427] The infraction must relate to a rule that is necessary to prevent serious danger in the workplace, such as violating a prohibition against smoking in an explosives plant or oil refinery.[428]

[419] 29 C.F.R. § 541.602(a).

[420] *Id.*

[421] 29 C.F.R. § 541.602(b)(3).

[422] *Id.*

[423] 29 C.F.R. § 541.602(b)(5).

[424] *Id.*

[425] *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22171 (Apr. 23, 2004).

[426] 29 C.F.R. § 541.602(b)(5).

[427] 29 C.F.R. § 541.602(b)(4).

[428] *Id.*

(2) Deductions for Personal Absences

Deductions from pay are permissible when an exempt employee is absent from work for one or more full days for personal reasons other than sickness or disability.[429] An employer may not deduct any amount from an exempt employee's pay when the employee is absent only part of a day.[430] An employer may, however, take deductions from an employee's vacation or leave bank in less than full-day increments, so long as the deductions do not affect the amount of salary paid to the employee.[431]

(3) Deductions for Sickness or Disability

An employer may make deductions from an employee's pay for absences of one or more full days because of sickness or disability if the deductions are made in accordance with a bona fide plan, policy, or practice providing compensation for loss of salary because of illness.[432] The employer does not need to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the employer's plan, policy, or practice.[433] Further, the employer may make deductions for full-day absences due to sickness or disability if the employee receives salary replacement benefits through workers' compensation or disability insurance.[434]

(4) Deductions Taken Pursuant to the Family and Medical Leave Act and Massachusetts Small Necessities Leave Act

Under the FMLA, qualified employees are entitled to unpaid leave under certain circumstances. With respect to the salary basis test, an employer is not required to pay the full salary of an employee who takes unpaid leave under the FMLA even where the leave is not taken in full-day increments.[435] Thus, the employer may make deductions from an exempt employee's salary for "any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee."[436] The employer is only obligated to pay a proportionate part of the employee's full salary for the time actually worked.[437] For example, if an employee

[429] 29 C.F.R. § 541.602(b)(1).

[430] *Id.*

[431] See Section VI.A.2.a(5) for a detailed discussion of permissible deductions from an employee's vacation or leave bank.

[432] 29 C.F.R. § 541.602(b)(2).

[433] *Id.* Deductions from an employee's salary are permissible for full-day absences that occur before the employee has qualified under an employer's plan, policy, or practice, as well as for full-day absences taken by an employee after the employee has exhausted the available leave. For example, if an employer's short-term disability policy allows for twelve weeks of leave beginning on the fourth day of an absence, an employer may make deductions from pay for the three days prior to qualifying for the leave and for any full-day absences following the twelve-week leave period.

[434] *Id.*

[435] 29 C.F.R. § 541.602(b)(7).

[436] 29 C.F.R. § 825.206.

[437] 29 C.F.R. § 541.602(b)(7).

generally works forty hours per week but uses ten hours of unpaid leave under the FMLA, the employer may deduct 25 percent of the employee's normal salary for that week.

If an exempt employee takes leave pursuant to the SNLA or any other Massachusetts leave law, and the leave does not also qualify as FMLA leave, deductions may only be made from the employee's pay for leave taken in full-day increments.[438] If an exempt employee works part of a day and takes leave pursuant to the SNLA for the remainder of the day, the employee must be paid for the full day to avoid compromising the salary basis test.[439]

(5) Deductions from Vacation or Leave Banks

There is an important distinction between deductions from the salary of an exempt employee and deductions from an exempt employee's vacation or leave bank. Deductions from leave banks are not treated as deductions from salary, so long as the total amount the employee receives in his or her paycheck each pay period, including any amounts from paid vacation or sick leave, equals the employee's full predetermined salary.[440] An employer may mandate use of vacation time from an employee's vacation bank on a particular day when the employee is not needed due to a lack of work, even though a reduction in pay under those circumstances would constitute an impermissible deduction for an employer-occasioned absence.[441] Similarly, deductions from leave banks in less than full-day increments are permissible, whereas partial-day deductions from salary are not permitted.[442] An exempt employee who does not have accrued leave benefits or who has a negative balance in his or her leave bank must still receive full salary for any day in which the employee is willing and able to work, and on any day in which he or she actually performs work.[443]

Employers should be cognizant of certain pitfalls associated with deductions from leave banks. If a leave bank or vacation policy is not carefully drafted and administered, deductions for negative leave may in certain circumstances lead to inadvertent violations of the salary basis test. For example, if an exempt employee performs some work (i.e., checks and responds to e-mails) during a "vacation day," that action may cause the day to be considered a partial-day, rather than a full-day, absence. If a deduction is made from the employee's leave bank for that "vacation day" and the deduction causes the employee to accrue a negative leave balance, the employer cannot recoup the negative leave balance without subjecting the employee to a pay deduction for

[438] DOL Wage & Hour Opinion Letter FLSA2007-6 (Feb. 8, 2007).

[439] *Id.*

[440] DOL Wage & Hour Opinion Letter FLSA2009-2 (Jan. 14, 2009). *See also* DOL Wage & Hour Opinion Letter FLSA2005-41 (Oct. 24, 2005) (finding permissible employer's mandating use of accrued vacation on days where employer's facility is closed due to inclement weather). As explained above in Section III.B.3, there are additional risks associated with deductions from leave or vacation banks under Massachusetts law because vacation time is considered wages.

[441] *Id.*

[442] DOL Wage & Hour Opinion Letter FLSA2009-18 (Jan. 16, 2009) ("Employers can, however, make deductions for absences from an exempt employee's leave bank in hourly increments, so long as the employee's salary is not reduced.").

[443] DOL Wage & Hour Opinion Letter FLSA2009-2 (Jan. 14, 2009).

a partial-day absence with possible adverse consequences for the exempt employee status. A policy or practice of such deductions may violate the requirements of the salary basis test and, as explained below, could potentially destroy the exempt status of part or all of a company's exempt workforce. Therefore, if an employee has taken more leave than he or she has actually accrued under the employer's plan, it is not advisable for the employer to attempt to recoup the negative leave balance from the employee's salary, including from the employee's final paycheck.

(6) Responses to Downturns in Business: Reductions in Pay and Furloughs

During downturns in business, an employer may look for ways to cut costs without reducing its workforce by decreasing the salary and hours of exempt employees. For example, an employer may seek to reduce employees' workweeks to four days per week and implement a corresponding 20 percent reduction in salaries. Although the law regarding reductions in an exempt employee's work schedule and pay remains somewhat unsettled, courts have held that prospectively reducing an employee's salary and work schedule does not destroy the employee's exempt status, so long as such adjustments are not a "sham" meant to circumvent the overtime laws.[444] Such adjustments must be relatively infrequent and remain in effect for a substantial period of time.[445] Due to the complexity of the law in this area, employers should consult legal counsel prior to implementing any such adjustments to an exempt employee's pay and schedule to minimize the risk of violating the salary basis test.

Under limited circumstances, employers may also choose to place exempt employees on unpaid leave or "furlough." To avoid running afoul of the requirement that an exempt employee receive full salary for any week in which he or she performs work, the furlough must be imposed in full-week increments.[446] If the employee performs any work at all during the furlough week—even simply checking his or her company e-mail account—the employee generally must be paid for that full week. As explained above, employers may mandate use of accrued vacation time during a furlough, rather than treating the furlough as unpaid.[447]

b. Violations of the Salary Basis Test

As explained above in Section VI.A.2, if an employer makes improper deductions from an employee's predetermined salary, the employee will no longer be considered to be paid on a

[444] *See Havey v. Homebound Mortg., Inc.*, 547 F.3d 158, 167 (2d Cir. 2008) (practice of adjusting salaries prospectively on a quarterly basis based on employees' performance in the prior quarter did not violate salary basis test); *Archuleta v. Wal-Mart Stores, Inc.*, 543 F.3d 1226, 1231 (10th Cir. 2008) (adjustments in salary and work schedule where average time between adjustments exceeded eleven months did not violate salary basis test).

[445] *Archuleta*, 543 F.3d 1226; *but see Thomas v. Cnty. of Fairfax, Virginia*, 758 F. Supp. 353 (E.D. Va. 1991) (practice that resulted in changes to employees' pay rates and salaries in every pay period violated salary basis test).

[446] 29 C.F.R. § 541.602.

[447] DOL Wage & Hour Opinion Letter FLSA2009-2 (Jan. 14, 2009). As always, however, employers should exercise caution if the furlough time causes the employee to overdraw his or her accrued vacation, as deductions for the overdrawn amount may increase the risk that the salary basis test could be violated should an exempt employee work during the furlough.

salary basis and will no longer be exempt.[448] In addition, plaintiff-side attorneys may argue that an employer's practices may in certain circumstances, even as applied to a small number of exempt employees, compromise the exempt status of other employees similarly situated to that employee.[449]

An employer may be found to have violated the salary basis test "if the facts demonstrate that the employer did not intend to pay employees on a salary basis." [450] Proof of an actual practice of making improper deductions establishes that the employer did not intend to pay employees on a salary basis.[451] The First Circuit requires employees to identify specific practices that create a genuine issue of material fact as to the employer's intentions.[452] In evaluating whether the employer had an actual practice of improper deductions, the regulations consider factors, including but not limited to:

- The number of improper deductions, particularly as compared to the number of employee infractions warranting discipline
- The time period during which the employer made improper deductions
- The number and geographic location of employees whose salary was improperly reduced
- The number and geographic location of managers responsible for taking the improper deductions
- Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions[453]

If an "actual practice" is found, the exemption may be lost during the time period of the deductions for all employees in the same job classification working for the same managers responsible for the improper deductions, even if some of those employees were not subject to

[448] 29 C.F.R. § 541.603.

[449] *Id.*

[450] 29 C.F.R. § 541.603. Prior to the 2004 DOL regulations, an employment policy that created "significant likelihood" of improper deductions could result in a loss of the exemption. *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905 (1997). Some courts continue to use the significant likelihood test. *Martinez v. Hilton Hotels Corp.*, 930 F. Supp. 2d 508, 521-522 (S.D.N.Y. 2013).

[451] 29 C.F.R. § 541.603 (a)

[452] *Crowe v. ExamWorks, Inc.*, 136 F. Supp. 3d 16, 19 n.11 (1st Cir. 2015).

[453] 29 C.F.R. § 541.603(a).

improper deductions.[454] Employees in different job classifications or who work for different managers do not lose their status as exempt employees.[455]

Because violations of the salary basis test can have serious and widespread ramifications, employers should seek the advice of legal counsel before making deductions from an exempt employee's salary, including attempts to recoup monies from the employee's final paycheck (such as negative leave balances or tuition costs). While Massachusetts has adopted the FLSA's salary basis requirements, violations of these requirements by a Massachusetts employer impose greater liability because of the Commonwealth's mandatory treble damages law, described in detail in Section XVIII.G.

c. Safe Harbor for Employers That Make Impermissible Deductions

Improper deductions that are either isolated or inadvertent will not result in loss of the exemption if the employer reimburses the employees for the improper deductions.[456] The First Circuit has not interpreted this federal regulation, but other courts have held that this "window of correction" may apply even where corrective payments were made years after an improper deduction occurred.[457] Courts generally have found that the provision does not apply where the employer had a policy of making improper deductions, or where the facts demonstrate that the employer did not intend to pay the employees at issue on a salary basis.[458] Any employer that suspects that it has violated the salary basis test should contact legal counsel to discuss its exposure and potential remedial measure.

3. Duties Tests for White Collar Exemptions

In addition to meeting the compensation requirements and salary basis test, an employee must meet one of the following duties tests to qualify for a white collar exemption from overtime. The tests set forth certain specific duties that the employee must perform to qualify as a bona fide

[454] 29 C.F.R. § 541.603(b).

[455] *Id*. "[F]or example, if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager" may be subject to the argument that they are misclassified; however, the exempt status of engineers "at other facilities or working for other managers []would remain exempt." *Id*.

[456] 29 C.F.R. § 541.603(c).

[457] *See, e.g.*, *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 498 (5th Cir. 2003) (reimbursement made five days before trial preserved exemption). Because the DLS has adopted the federal regulations addressing the white collar exemptions, arguably the safe harbor applies under Massachusetts law as well.

[458] *See, e.g.*, *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 372 (7th Cir. 2005) ("If the employees can show that the deductions were not merely happenstance, but a routine practice or company policy, the employer may not rely on the margin of error tolerated by the regulation."); *Takacs v. Hahn Auto. Corp.*, 246 F.3d 776, 783 (6th Cir. 2001) ("[T]he 'window of correction' regulation allows use of the defense only after an employer has first demonstrated an intention to pay its employees on a salary basis.").

executive, administrative, or professional employee.[459] The Massachusetts Minimum Fair Wage regulations (discussed in Section IV) explicitly adopt the federal definitions of bona fide executive, administrative, and professional employees, including the duties tests for each of the white collar exemptions.[460] The now-enjoined DOL 2016 Final Rule did not make changes to the duties test.[461]

a. Executive Employee Exemption

To qualify for the executive employee exemption, an employee must exercise a large degree of authority over other employees. Specifically, the employee must meet the following requirements:

1. The employee must be compensated on a salary basis at a rate not less than $455.00 per week.

2. The employee's primary duty[462] must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.

3. The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent (e.g., four half-time employees).

4. 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.[463]

[459] Certain highly compensated employees who perform some, but not all, of the duties set forth in the executive, administrative, or professional duties tests will also qualify as exempt from the overtime requirements. The exemption for highly compensated employees is discussed in Section VI.A.4.

[460] 454 C.M.R. § 27.03; 29 C.F.R. § 541 for the adopted definitions. *See also* DLS Opinion Letter MW-2008-004 (July 14, 2008) (providing that federal salary, salary basis, and duties tests are incorporated by reference into Massachusetts state regulations governing overtime).

[461] DOL Wage and Hour Division Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative and Professional Employees (May 2016).

[462] "Primary duty" is defined as "the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." 29 C.F.R. § 541.700(a). While the regulations state that the amount of time an employee spends on a particular duty is but one factor to be considered in determining the employee's primary duty, some courts outside the First Circuit have given this factor deciding weight in addressing the executive exemption. *See Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1269 (11th Cir. 2008) (store managers non-exempt because "the overwhelming evidence at trial showed Plaintiff store managers spent 80 to 90 percent of their time performing non-exempt, manual labor"); *but see, Marzuq v. Cadete Enters.*, 807 F.3d 431 (1st Cir. 2015) (fact that 90 percent of time spent was on non-exempt activity combined with other factors raises a question of material fact as to whether store managers were exempt).

[463] 29 C.F.R. § 541.100.

The following sections examine the necessary elements of the executive duties test to assist employers in correctly classifying employees as falling within this exemption.

(1) Management Duties

To qualify for the executive exemption, an employee's primary duty must be "managing" other employees. Although the following list is not exhaustive, it provides examples of activities considered "management" duties for purposes of this exemption:

- Interviewing, selecting, and training employees
- Setting and adjusting rates of pay and hours of work
- Directing the work of employees
- Maintaining production or sales records for use in supervision or control of employees or the business
- Assessing an employee's productivity and efficiency with the purpose of recommending promotions or other changes in status
- Handling employee complaints and grievances
- Disciplining employees
- Planning work
- Determining the techniques to be used in performing work
- Apportioning work among employees
- Determining the type of materials, supplies, machinery, equipment, or tools to be used or merchandise to be bought, stocked, and sold
- Controlling the flow and distribution of materials or merchandise and supplies
- Providing for the safety and security of the employees or the property
- Planning and controlling the budget
- Monitoring or implementing legal compliance measures[464]

[464] 29 C.F.R. § 541.102. The federal regulations also specifically provide that an employee who owns at least a bona fide 20 percent equity interest in the enterprise in which he or she works, regardless of the type of business organization, and who is actively engaged in its management, is considered a bona fide exempt executive. 29 C.F.R. § 541.101.

While determining the "primary duty" is a qualitative not quantitative test, at least one recent decision by the First Circuit found that the amount of time spent on non-exempt activities could be a significant factor in determining the "primary duty" of a role.[465]

(2) A Customarily Recognized Department or Subdivision

To qualify for the executive exemption, an individual must manage the enterprise or a "customarily recognized department or subdivision of the enterprise." The phrase "a customarily recognized department or subdivision" is intended to "distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function."[466] For example, an employer's human resources department might have subdivisions for labor relations, pensions and other benefits, personnel management, and equal employment opportunity, each of which has a permanent status and function and could qualify as a recognized subdivision for purposes of the executive exemption.[467] Likewise, where an enterprise has more than one establishment, each establishment may qualify as a recognized subdivision.[468] Under certain circumstances, employees working a particular shift can constitute a department or subdivision,[469] as can groupings or teams of employees engaged in work on a related project or specialty within a larger department.[470] A case-by-case analysis is required to determine whether particular groupings or teams qualify as departments or subdivisions.

(3) Directing the Work of at Least Two or More Full-Time Employees

The executive exemption requires that an individual customarily and regularly direct the work of at least two or more other full-time employees. As interpreted by the federal regulations, the phrase "two or more other employees" means two full-time employees or their equivalent. Thus, one full-time employee and two half-time employees or four half-time employees would equal two full-time employees.[471] In addition, supervision of a department or other group can be distributed among two, three, or more managers, but each such manager must customarily and regularly direct the work of two or more other full-time employees or the equivalent.[472] For

[465] *Marzuq v. Cadete Enters.*, 807 F.3d 431 (1st Cir. 2015) (fact that 90 percent of time spent was on non-exempt activity combined with other factors raises a question of material fact as to whether store managers were exempt).

[466] 29 C.F.R. § 541.103(a); DOL Wage & Hour Fact Sheet #17A (July 2008).

[467] 29 C.F.R. § 541.103(a); DOL Wage & Hour Fact Sheet #17A (July 2008).

[468] 29 C.F.R. § 541.103(b).

[469] *West v. Anne Arundel Cnty., Maryland*, 137 F.3d 752, 763 (4th Cir. 1998) (finding that a shift of fire department officers constituted a customarily recognized department or subdivision).

[470] *Phillips v. Fed. Cartridge Corp.*, 69 F. Supp. 522, 526 (D. Minn. 1947) (finding that team of four engineers who specialized in designing gauges within larger engineering department was a recognized department and its group leader qualified as exempt executive). *See also Gorman v. Cont'l Can Co.*, 1985 WL 5208, at *6 (N.D. Ill. Dec. 31, 1985) (citing *Phillips* for the proposition that the term "customarily recognized department" can include "small groups of employees working on a related project within a larger department").

[471] 29 C.F.R. § 541.104(a); DOL Wage & Hour Fact Sheet #17B (July 2008).

[472] 29 C.F.R. § 541.104(b); DOL Wage & Hour Fact Sheet #17B (July 2008).

example, a department with five full-time non-exempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.[473] An employee who "merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement."[474] In addition, hours worked by a non-exempt employee "cannot be credited more than once for different executives." Therefore, a "shared responsibility for the supervision of the same two employees in the same department does not satisfy this requirement."[475]

(4) Authority Necessary to Qualify as an Executive

To qualify for the executive exemption, an individual must have the authority to hire or fire other employees, or the individual's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status must be given particular weight.[476] The individual need not possess absolute authority to make decisions regarding an employee's status, so long as his or her opinions regarding such decisions are given "particular weight." Factors to consider when determining whether an individual's recommendations are given "particular weight" include but are not limited to whether it is part of the individual's job duties to make such recommendations and the frequency with which such recommendations are made, requested, and relied upon.[477]

Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. In addition, occasional suggestions regarding these decisions are not sufficient to justify the exemption.[478] However, an individual's recommendations may still be judged to have "particular weight" even if a higher level manager's recommendations have more importance and even if the individual does not have authority to make the ultimate decision as to an employee's change in status.[479]

(5) Application of Executive Exemption to an Employee Who Performs Both Exempt and Non-Exempt Duties

Two portions of the duties test for the executive exemption address not only the types of duties performed but also the frequency with which those duties are performed. Specifically, the test requires that an employee's "primary duty" involve management and that the employee

[473] *Id.*

[474] 29 C.F.R. § 541.104(c).

[475] 29 C.F.R. § 541.104(d).

[476] 29 C.F.R. § 541.100(4).

[477] 29 C.F.R. § 541.105; DOL Wage & Hour Fact Sheet #17B (July 2008). *See also Marchant v. Sands Taylor & Wood Co.*, 75 F. Supp. 783, 786 (D. Mass. 1948).

[478] 29 C.F.R. § 541.105.

[479] *Id.*

"customarily and regularly" direct the work of at least two other full-time employees.[480] These requirements raise issues where an employee performs both exempt and non-exempt duties.

Concurrent performance of exempt and non-exempt duties does not disqualify an employee from the executive exemption if the necessary elements of the exemption are otherwise met.[481] However, employees with some supervisory responsibilities whose primary duties are the same as those of subordinates are unlikely to qualify as exempt executives.[482] Determining whether an employee who performs both exempt and non-exempt duties satisfies the duties test entails a fact-intensive case-by-case analysis, and employers should carefully review positions in which an exempt employee is performing non-exempt duties.[483] Generally, an exempt executive makes the decision regarding when to perform non-exempt duties and remains responsible for the success or failure of business operations under his or her management while performing the non-exempt work.[484] By comparison, a non-exempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods.[485] An employee whose primary duty is ordinary production work or routine, recurrent, or repetitive tasks cannot qualify for the executive exemption.[486]

(a) Federal Regulations

The federal regulations provide some specific guidance regarding when an employee performing non-exempt duties is likely to qualify as an executive employee. For example, the regulations specify that an assistant manager in a retail establishment may meet the requirements of the exemption even if he or she performs non-exempt work, such as serving customers, cooking food, stocking shelves, and cleaning the establishment, as long as the assistant manager's primary duty is management.[487] The regulations specifically note that an assistant manager can simultaneously supervise employees and serve customers, or direct the work of other employees and stock shelves.[488]

The regulations governing the executive exemption also provide examples of circumstances in which employees who perform both exempt and non-exempt duties do not meet the exemption requirements. For instance, a working supervisor whose primary duty is performing non-exempt

[480] The definition of "primary duty" is discussed *supra* note 462.

[481] 29 C.F.R. § 541.106.

[482] *Id.*

[483] *See, e.g., Pendlebury v. Starbucks Coffee Co.*, 2008 WL 763213 (S.D. Fla. Mar. 13, 2008) (denying defendant's motion for summary judgment and holding that whether store managers' primary duties were management or non-management was question of fact for jury).

[484] 29 C.F.R. § 541.106(a).

[485] *Id.*

[486] *Id.*

[487] 29 C.F.R. § 541.106(b).

[488] *Id.*

work on a production line in a manufacturing plant is not exempt merely because the employee occasionally has some responsibility for directing the work of other non-exempt production line employees, when perhaps the exempt supervisor is unavailable.[489] Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee directs the work of other employees on the job site, orders parts and materials, and handles requests from the prime contractor.[490]

(b) Case Law

Many courts have determined that an employee's primary duty is management despite the fact that the employee concurrently performs non-exempt duties.[491] For example, in *Donovan v. Burger King Corporation*, the First Circuit held that assistant managers in forty-four Burger King fast food restaurants were exempt executives even though they spent approximately 40 percent of their time performing such tasks as preparing food and taking orders because performance of that type of non-exempt work "does not negate the conclusion that the employee's primary duty is management."[492] The court found that these employees were truly "in charge" of the restaurants during their shifts and therefore met the primary duties test for the exemption.[493]

However, in *Marzuq v. Cadete Enterprises, Inc.*, the First Circuit vacated a decision granting an employer's motion for summary judgment based on the similarities between that case and *Burger King*, holding that a dispute of material fact existed as to whether two store managers at a food retail store satisfied the primary duties test.[494] In *Marzuq*, the First Circuit emphasized that the managers alleged that they spent 90 percent of their time serving customers, making food, sweeping floors, and performing other non-managerial duties and had insufficient time to perform

[489] 29 C.F.R. § 541.106(c).

[490] *Id.*

[491] *See, e.g.*, *Donovan v. Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1982).

[492] *Id.*

[493] *Id.* Similarly, some courts have found that store managers at various types of retail establishments who spent as much as 90 percent of their time on non-management jobs, such as pumping gas, waiting on customers, and stocking shelves, were exempt because they simultaneously were responsible for management functions, such as hiring, firing, and supervising other employees; dealing with vendors; and ensuring proper accounting of inventory and cash. *See Jones v. Virginia Oil Co.*, 69 F. App'x 633, 2003 WL 21699882 (4th Cir. July 23, 2003) (finding manager of combination convenience store and fast food restaurant exempt despite spending 75-80 percent of her time on "basic line-worker tasks" because she simultaneously supervised employees, handled customer complaints, and dealt with vendors); *Murray v. Stuckey's, Inc.*, 939 F.2d 614 (8th Cir. 1991) (finding managers for chain of gas stations, convenience stores, and restaurants who spent 65-90 percent of their time serving customers and performing other non-exempt tasks had a primary duty of "management" because they were "in charge" of their stores); *Langley v. Gymboree Operations, Inc.*, 530 F. Supp. 2d 1297 (S.D. Fla. 2008) (finding store manager for children's clothing store exempt); *Posely v. Eckerd Corp.*, 433 F. Supp. 2d 1287 (S.D. Fla. 2006) (finding store manager for pharmacy exempt); *Jackson v. Advance Auto Parts, Inc.*, 362 F. Supp. 2d 1323 (N.D. Ga. 2005) (finding store manager for auto parts store exempt); *but see Morgan*, 551 F.3d at 1269 (store managers non-exempt because "the overwhelming evidence at trial showed Plaintiff store managers spent 80 to 90 percent of their time performing non-exempt, manual labor").

[494] *Marzuq v. Cadete Enters.*, 807 F.3d 431, 446 (1st Cir. 2015). The First Circuit also distinguished *Burger King* because that decision was based on the district court's factual findings after a bench trial, whereas in *Marzuq*, the district court was required, on a summary judgment motion, to view all facts in the light most favorable to the plaintiff-managers. *Id*.

their management duties.[495] They also claimed to have had limited decision-making authority, were subject to close supervision, and received very similar pay to non-exempt employees.[496] Based on these allegations, the court reversed the grant of summary judgment.

In *Goodrow v. Lane Bryant, Inc.*, Massachusetts's highest court held that an employee who worked as a "co-sales manager" at a retail store was not a "bona fide executive" exempt from overtime provisions even though she had temporarily assumed managerial duties at the store.[497] The Court found that the employee did not qualify for the exemption because she did not spend more than 50 percent of her time performing managerial duties, she directed the work of only one part-time sales associate and had no authority to influence personnel decisions, and she was primarily occupied with carrying out day-to-day activities of the retail business.[498]

b. Administrative Employee Exemption

To qualify for the administrative exemption, an employee must meet all of the following tests:

1. The employee must be compensated on a salary or fee basis at a rate not less than $455.00 per week.

2. 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 (often referred to as the administrative-production dichotomy).

3. The employee's primary duty must involve the exercise of discretion and independent judgment with respect to matters of significance.[499]

The following sections discuss the various components of the administrative exemption and provide guidance on what types of job classifications fall within this exemption.

[495] *Id.*

[496] *Id*. The First Circuit analyzed four factors in evaluating the primary duty: (1) relative importance of managers' exempt and other duties; (2) amount of time spent on exempt work; (3) freedom from direct supervision; and (4) the relationship between managers' salaries and the wages paid hourly employees for similar non-exempt work. *Marzuq*, 807 F.3d at 431.

[497] *Goodrow v. Lane Bryant, Inc.*, 432 Mass. 165, 173 (2000).

[498] *Id*. at 172.

[499] 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. Employers with employees who may meet the requirements of the academic administrative exemption are encouraged to speak to legal counsel regarding the specific elements of this provision.

(1) Primary Duty Is Office or Non-Manual Work Directly Related to the Management or General Business Operations of the Employer

To qualify for the administrative exemption, an employee's primary duty must be the performance of office or non-manual work that directly relates to assisting with the running or servicing of the business, as distinguished from production or sales work[500] Thus, an employee whose primary duty is working on a manufacturing production line or selling products in a retail or service establishment would not qualify for the administrative exemption.[501] Non-manual or office work considered to be directly related to management or general business operations includes but is not limited to work in functional areas such as:

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality control
- Purchasing
- Procurement
- Advertising
- Marketing
- Research
- Safety and health
- Personnel management
- Human resources

[500] 29 C.F.R. § 541.201(a).

[501] *Id.*

- Employee benefits
- Labor relations
- Public relations
- Government relations
- Computer networks
- Internet and database administration
- Legal and regulatory compliance[502]

While an employee may perform some sales or production work and still be considered an administrative employee, his or her "primary duty" must be office or non-manual work as described above. The term "primary duty" is defined as "the principal, main, major or most important duty that the employee performs."[503] Determination of an employee's primary duty is based on all the facts in a particular case with the primary emphasis on the overall character of the employee's job.[504]

In assessing whether an employee meets the requirements of the administrative exemption, courts sometimes look to what is called the "administrative-production dichotomy."[505] In so doing, courts ask whether the employee's main job function is to "generate . . . [the] product or service the employer's business offers to the public," or whether the employee's job function is "ancillary" to the generation of that product or service.[506] An employee whose main job function is generating the employer's product will typically not qualify for the administrative exemption.[507]

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[502] 29 C.F.R. § 541.201(b); DOL Wage & Hour Fact Sheet #17C (July 2008).

[503] 29 C.F.R. § 541.700(a); DOL Wage & Hour Fact Sheet #17C (July 2008).

[504] 29 C.F.R. § 541.700(a); DOL Wage & Hour Fact Sheet #17C (July 2008).

[505] *See Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 9-10 (1st Cir. 1997) (holding that insurance sales personnel were not "production" employees because they did not "generate" company's main product—insurance policies).

[506] *Id. See also Hines v. State Room, Inc.*, 665 F.3d 235, 242 (1st Cir. 2011) (sales managers at banquet facility exempt because their work was ancillary to employer's business of providing banquets); *Cash v. Cycle Craft Co.*, 508 F.3d 680, 686 (1st Cir. 2007) (new purchase/customer relations manager exempt because his role in improving customer service and creating bid proposals to meet the needs of his agent's customers involved "exercising independent judgement as he engaged in the company's business operations").

[507] The administrative-production dichotomy has received renewed attention after the DOL's Wage and Hour Division issued an "Administrator's Interpretation" in which it concluded that the administrative exemption does not apply to the "typical" mortgage loan officer because a loan officer's duties generally involve sales and servicing customers, rather than focusing on the management or general business operations of the employer. *See* DOL WHD Administrator's Interpretation FLSA No. 2010-1 (Mar. 24, 2010) available at http://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.htm#.UOo5a7Zqs6U (last visited Jan. 11, 2017). The U.S. Supreme Court held that the DOL's interpretation did not violate the notice-and-comment procedures of Administrative Procedures Act. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015).

Under certain circumstances, however, an employee may meet the "directly related to management or general business operations" prong of the duties test even if some of his or her job functions would be considered production duties.[508] For example, an employee may qualify for the administrative exemption if his or her primary duty is the performance of office or non-manual work directly related to the management or business operations of the employer's *customers*.[509] Thus, employees acting as advisors or consultants to the employer's customers—such as tax experts or financial consultants—may be exempt, even though their employer's main business is the sale of such services.[510]

(2) Exercise of Discretion and Independent Judgment

To qualify for the administrative exemption, an employee's primary duty must include the exercise of "discretion and independent judgment" with respect to matters of significance.[511] The exercise of discretion and independent judgment generally involves comparing and evaluating several possible courses of conduct and making a decision after the various possibilities have been considered.[512] The regulations specify that determining whether an employee meets this requirement is fact-specific and must be examined on a case-by-case basis.[513] Factors to consider in making this determination include whether the employee:

- Has authority to formulate, affect, interpret, or implement management policies or operating practices
- Carries out major assignments in conducting the operations of the business
- Performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business
- Has authority to commit the employer in matters that have significant financial impact
- Has authority to waive or deviate from established policies and procedures without prior approval

[508] *See, e.g.*, *Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865 (7th Cir. 2008).

[509] 29 C.F.R. § 541.201(c).

[510] *Id. See also Roe-Midgett*, 512 F.3d at 872 (holding that employees of company that specialized in processing insurance claims on behalf of insurance companies were exempt because they "serviced" clients' businesses, even though their own employer's primary business was to sell the claim processing services they performed).

[511] 29 C.F.R. § 541.202(a); *Cash*, 508 F.3d at 686.

[512] *Id.*; *Crowe*, 136 F. Supp. 3d at 42 (position required independent discretion and judgment because clinical quality assurance coordinators could independently determine whether a reviewing physicians rationale was well-supported and recommend alternative determinations).

[513] 29 C.F.R. § 541.202(b). The First Circuit granted a motion for summary judgment in favor of the employer because the employee's poor performance was the reason she did not exercise the judgment and discretion that the position required. *DiBlasi v. Liberty Mut. Grp Inc.*, 2014 U.S. Dist. LEXIS 45898, at *27 (D. Mass. Apr. 3, 2014).

- Has authority to negotiate and bind the company on significant matters
- Provides consultation or expert advice to management
- Is involved in planning long-term or short-term business objectives
- Investigates and resolves matters of significance on behalf of management
- Represents the company in handling complaints, arbitrating disputes, or resolving grievances[514]

Federal courts generally find that employees who engage in two or three of the above activities qualify for the administrative exemption.[515]

In general, an employee who exercises discretion and independent judgment has the authority to make independent choices without immediate direction or supervision.[516] However, this does not mean that to qualify for the exemption, the decisions made by an employee must be final or that the employee has unlimited authority. Employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed and revised at a higher level.[517]

The federal regulations provide the following specific examples illustrating when an employee will qualify for the administrative exemption even though his or her decision is not final:

- A credit manager of a large corporation formulates policies that are subject to review by higher company officials who may then approve or disapprove these policies.
- A management consultant who makes a study of the operations of a business and draws up a plan for proposed change in an organization may then have the plan reviewed or revised by superiors before it is submitted to the client.[518]

The exercise of discretion and independent judgment requires more than the use of skill in applying well established techniques, procedures, or standards described in sources such as

[514] *Id.*

[515] *Bondy v. City of Dallas*, 77 F. App'x 731, 2003 WL 22316855, at *1 (5th Cir. Oct. 9, 2003); *Robinson-Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886 (D.C. Cir. 2010); *Napert v. Gov't Emps. Ins. Co.*, 36 F. Supp. 3d 237 (1st Cir. 2014).

[516] 29 C.F.R. § 541.202(c).

[517] *Id.*

[518] *Id.* While administrative employees' decisions may clearly be reviewed at higher levels, the law is unsettled with respect to the effect on exercise of independent judgment and discretion of workplace rules and legal requirements that limit what employees may say or do. Some courts have held that it remains possible to exercise discretion in heavily regulated industries. *See Renfro v. Indiana Michigan Power Co.*, 370 F.3d 512 (6th Cir. 2004). The DOL, however, has recently taken the opposite position, arguing in several cases involving pharmaceutical sales representatives that because the FDA regulates how these employees may interact with prescribers, they cannot exercise independent judgment and discretion. *See In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 156-57 (2d Cir. 2010) (deferring to DOL *amicus* brief).

manuals.[519] The regulations specify that this requirement precludes the following types of work from qualifying for the administrative exemption: clerical or secretarial work; recording or tabulating data, even if the employee's position is labeled "statistician;" and performing other mechanical, repetitive, recurrent, or routine work.[520]

(3) Matters of Significance

The administrative exemption requires that an employee exercise judgment with respect to "matters of significance." The term "matters of significance" refers to the level of importance or consequence of the work performed.[521] An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.[522] For example, a messenger entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may occur if the employee is neglectful in performing his or her duties.[523] Similarly, an employee who operates very expensive equipment does not meet this requirement simply because improper performance of his or her duties may cause significant financial loss to the employer.[524] Conversely, one court found that employees of a nightclub operator, who were charged with ensuring that their employer's venues were properly maintained and who managed relationships with liquor vendors, exercised independent judgment in matters of significance.[525] In addition, employees with authority to make recommendations as to the pricing and structure of contracts for lease of medical devices were found to exercise independent judgment in matters of significance.[526]

(4) Examples of Positions That Qualify for the Administrative Exemption

The regulations provide several specific examples of positions that generally qualify for the administrative exemption, including the following:

- Insurance claims adjusters, if their duties include activities such as interviewing clients, witnesses, and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations

[519] 29 C.F.R. § 541.202(e); 29 C.F.R. § 541.704.

[520] 29 C.F.R. § 541.202(e); 29 C.F.R. § 541.704.

[521] 29 C.F.R. § 541.202(f).

[522] *Id.*

[523] *Id.*

[524] *Id.*

[525] *See McKee v. CBF Corp.*, 299 F. App'x 426, 2008 WL 4910671 (5th Cir. 2008).

[526] *See Reich v. Haemonetics Corp.*, 907 F. Supp. 512, 517 (D. Mass. 1995).

regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation[527]

- Employees in the financial services industry, if their primary duties include non-sales-oriented work, such as collecting and analyzing information regarding customers' income and investments; determining which financial products best meet customers' needs and financial circumstances; advising customers regarding the advantages and disadvantages of different financial products; and marketing, servicing, or promoting the employer's financial products (however, an employee whose primary duty is *selling* financial products does not qualify for this exemption)[528]

- An employee who leads a team of other employees assigned to complete major projects for the employer, such a purchasing, selling, or closing all or part of the business; negotiating a real estate transaction or a collective bargaining agreement; or designing and implementing productivity improvements[529]

- Purchasing agents who have the authority to bind the employer on significant purchases, even if they must consult with higher-level management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs[530]

- A buyer who evaluates reports on competitor prices in order to set the employer's prices[531]

(5) Examples of Positions That Do Not Qualify for the Administrative Exemption

The regulations also include examples of positions that generally do not meet the duties requirements for the administrative exemption:

- Comparison shopping performed by an employee of a retail store who merely reports to a buyer the prices at a competitor's store[532]

- Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, and health or sanitation, because their work does not involve work directly related to the management or general business operations of the

[527] 29 C.F.R. § 541.203(a).

[528] 29 C.F.R. § 541.203(b).

[529] 29 C.F.R. § 541.203(c).

[530] 29 C.F.R. § 541.203(f).

[531] 29 C.F.R. § 541.203(i).

[532] *Id.*

employer and because their work relies heavily on the routine application of skills and technical knowledge rather than the exercise of discretion and independent judgment[533]

- Employees referred to as examiners or graders, such as lumber graders, whose work involves the comparison of products with established standards that are frequently catalogued[534]

c. Professional Exemption

There are three types of professionals that are exempted from overtime under the FLSA: learned professionals, creative professionals, and computer professionals. Massachusetts has adopted both the learned and the creative professional exemptions, but neither the Massachusetts legislature nor the courts have addressed the computer professional exemption.

(1) Learned Professional Exemption

To qualify for the learned professional exemption, an employee must meet all of the following requirements:

- The employee must be compensated on a salary or fee basis at a rate not less than $455.00 per week.
- The employee's primary duty[535] must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character.
- The advanced knowledge must be in a field of science or learning.
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.[536]

(a) Work Requiring Advanced Knowledge

To qualify for the learned professional exemption, an employee's primary duty must be the performance of "work requiring advanced knowledge," meaning work that is predominantly intellectual in character and that requires the consistent exercise of discretion and judgment, as distinguished from the performance of routine mental, manual, mechanical, or physical work.[537] The discretion required to meet the professional exemption is a "lesser standard" than the

[533] 29 C.F.R. § 541.203(j).

[534] 29 C.F.R. § 541.203(h).

[535] The definition of the term "primary duty" is discussed *supra* note 462.

[536] 29 C.F.R. § 541.300.

[537] 29 C.F.R. § 541.301(b).

discretion required under the administrative exemption.[538] A professional employee generally uses advanced knowledge (typically attained through a formal academic program) to analyze, interpret, or make deductions from varying facts or circumstances.[539] For purposes of the exemption, advanced knowledge cannot be attained at the high school level.[540]

(b) Fields of Science or Learning

Pursuant to the federal regulations, the term "field of science and learning" encompasses but is not limited to the following professions:

- Law
- Medicine
- Theology
- Accounting
- Actuarial computation
- Engineering
- Architecture
- Teaching
- Various types of physical, chemical, and biological sciences
- Pharmacy
- Other occupations that have a recognized professional status (as distinguished from the mechanical arts or skilled trades, where the knowledge could be of a fairly advanced type but is not in a field of science or learning)[541]

(c) Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

The learned professional exemption is restricted to professions for which specialized academic training is a standard prerequisite for entrance into the profession.[542] The best evidence that an

[538] *De Jesus Rentas v. Baxter Pharmacy Servs. Corp.*, 286 F. Supp. 2d 235, 241 (D.P.R. 2003).

[539] *Id.*

[540] *Id.*

[541] *Id.*

[542] 29 C.F.R. § 541.301(d).

employee meets this requirement is the possession of the *appropriate* academic degree.[543] However, the word "customarily" means that the exemption is also available to employees in qualifying professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, the exemption is available to the occasional lawyer who did not go to law school, but who gained essentially the same knowledge through apprenticeship and has been admitted to practice law in the state in which he or she works.[544] This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.[545]

(d) Examples of Employees Who Qualify for the Learned Professional Exemption

The regulations specify that the following professionals qualify for the learned professional exemption:

- Registered or certified medical technologists
- Registered nurses
- Dental hygienists who have successfully completed four academic years of pre-professional and professional study at an accredited college or university
- Physicians assistants who meet standard prerequisites for practice
- Certified public accountants, as well as many other accountants who perform similar job duties
- Executive chefs and sous chefs who have attained a four-year academic degree in culinary arts
- Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized accredited curriculum
- Licensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study

[543] *Id.*; *Drexler v. TEL NEXX, Inc.*, 125 F. Supp. 3d 361, 373-374 (1st Cir. 2015) (denying defendant's motion to dismiss because plaintiff's advanced degree was in field not relevant to position and position did not require specialized knowledge typically acquired by obtaining advanced degree).

[544] *See* 29 C.F.R. § 541.301(d); *Drexler*, 125 F. Supp. 3d at 374; *Crowe*, 136 F. Supp. 3d at 44-45 (finding disputed material facts as to whether position required prolonged, advanced study).

[545] *Id.*

- Teachers whose primary duty is "teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who [are] employed and engaged in this activity as a teacher in an educational establishment"[546]

- Lawyers, scientists, and doctors with valid licenses or certificates permitting them to practice, who are engaged in the practice of law or medicine

- Medical interns and residents who hold the requisite academic degree for the general practice of medicine[547]

(e) Examples of Employees Who Do Not Qualify for the Learned Professional Exemption

The following categories of employees do not qualify for the learned professional exemption:

- Electricians

- Licensed practical nurses who do not possess a specialized advanced academic degree

- Beauticians

- Technicians

- Paralegals and legal assistants

- Cooks who perform predominantly routine mental, manual, mechanical, or physical work

- Bookkeepers and accounting clerks who normally perform routine work[548]

- Most airline pilots[549]

- Case managers at drug treatment centers when their position only requires a general academic education[550]

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[546] 29 C.F.R. § 541.303(a); DLS Opinion Letter MW-2004-001 (Dec. 16, 2004). Teachers are not subject to salary basis requirements. *See* Section VI.A (Minimum Comp Requirements).

[547] 29 C.F.R. § 541.301(e).

[548] 29 C.F.R. § 541.301.

[549] Generally, pilots do not qualify for the learned professional exemption. However, the DOL's Wage and Hour Division recently has taken a position of non-enforcement with regard to pilots and co-pilots of airplanes who hold FAA Airline Transport Certificates or Commercial Certificates, receive compensation on a salary or fee basis at a rate of at least $455.00 per week, and fly as business or company pilots. DOL Wage & Hour Opinion Letter FLSA2009-6 (Jan. 14, 2009). The DOL 2016 Final Rule does not specifically address whether airline pilots must meet the minimum salary requirement of $913.00 per week.

[550] DLS Opinion Letter MW-2001-016 (Nov. 19, 2001).

(2) Creative Professional Exemption

To qualify for the creative professional employee exemption, both of the following tests must be met:

1. The employee must be compensated on a salary or fee basis at a rate not less than $455.00 per week.

2. 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."[551]

(a) Work Requiring Invention, Imagination, Originality, or Talent

The requirement of invention, imagination, originality, or talent is what "distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy."[552] The duties performed by employees in these professions vary widely and the exemption for creative professionals depends on the extent of the invention, imagination, originality, or talent exercised by the employee. Determining whether the exemption applies, therefore, must be determined on a case-by-case basis.[553] The requirements are generally met by the following individuals:

- Actors
- Musicians
- Composers
- Conductors
- Soloists
- Certain painters
- Writers
- Cartoonists
- Essayists

[551] 29 C.F.R. § 541.302(a).

[552] 29 C.F.R. § 541.302(c).

[553] *Id.*

- Novelists
- Persons holding positions with primary responsibility for writing in advertising agencies[554]

Journalists may satisfy the requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality, or talent. A journalist will not qualify as an exempt creative professional if he or she only collects, organizes, and records information that is routine or already public, or if he or she does not contribute a unique interpretation or analysis to a news product.[555]

(b) Recognized Field of Artistic or Creative Endeavor

The creative professional exemption requires that the work be performed in a "recognized field of artistic or creative endeavor." This includes such fields as music, writing, acting, and the graphic arts.

d. Computer Professional Exemption

The FLSA exempts computer professionals from mandatory overtime compensation.[556] Massachusetts has not specifically adopted this exemption, and it is unclear whether it applies to Massachusetts employees.[557] Some computer employees who qualify for the computer professional exemption may also be exempt pursuant to the administrative or executive exemptions.[558] Thus, even if this specific exemption is found inapplicable to Massachusetts employees, certain employees may still meet the requirements for either the administrative or executive exemption. Employers should note that the exemption for computer professionals applies only to employees involved in complex programming and systems or program design. Consequently, information technology and help desk employees usually do not qualify for the exemption.[559]

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[554] *Id.*

[555] 29 C.F.R. § 541.302(d).

[556] 29 U.S.C. § 213(a)(1)(17).

[557] While no Massachusetts authority specifically adopts this provision, the reasoning applied by the DLS in an opinion letter adopting the FLSA's exemption for highly compensated employees appears equally relevant to the computer professional exemption. *See* DLS Opinion Letter MW-2008-004 (July 14, 2008) (DLS articulating its belief that the Massachusetts overtime regulations incorporate wholesale the federal exempt status regulations: "The [federal regulations'] salary, salary basis, and duties tests are incorporated by reference into the state regulation, and this incorporation includes the provisions for 'highly compensated employees.'"). This broad incorporation presumably includes the computer professional exemption.

[558] 29 C.F.R.§ 541.102.

[559] *See, e.g.*, DOL Wage & Hour Opinion Letter FLSA2006-42 (Oct. 26, 2006) (opining that IT support specialist was non-exempt where employee's primary duty was diagnosis and resolution of computer-related problems, even though employee spent some time "participating in the design of client configurations and analyzing and selecting new technology").

To qualify for the computer professional 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 skills[560]

Job titles vary widely in the computer industry and thus are not determinative of whether an employee's job duties qualify him or her as an exempt computer professional.[561] Instead, courts look to whether the employee's primary job duty falls within the criteria specified by the regulation.[562]

The computer professional exemption does not include employees whose primary duty is the manufacture or repair of computer hardware and related equipment.[563] In addition, employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (such as engineers, drafters, and other employees skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are not exempt.[564] Finally, mere maintenance and installation of computer systems will not meet the standards for exemption.[565]

[560] 29 C.F.R. § 541.400.

[561] *Id.*

[562] DOL Wage & Hour Opinion Letter FLSA2006-42 (Oct. 26, 2006).

[563] 29 C.F.R. § 541.401.

[564] *Id.*

[565] DOL Wage & Hour Opinion Letter FLSA2006-42 (Oct. 26, 2006).

4. Highly Compensated Employee Exemption

Both the Massachusetts Minimum Fair Wage Law and the FLSA exempt certain "highly compensated employees" from overtime requirements. As with the definitions of the administrative, executive, and professional exemptions, Massachusetts law relies on the definition for "highly compensated employees" set forth in the federal regulations.[566] Under this exemption, employees are exempt from overtime if:

1. The employee earns a total annual compensation of $100,000[567] or more, which includes at least $455.00[568] 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.[569]

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.[570] Thus, a highly compensated employee will qualify for this exemption if the employee customarily and regularly performs one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.[571] For example, an employee may qualify as a highly compensated executive employee if he or she customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption.[572]

The exemption for highly compensated employees applies only to employees whose primary duty includes performing office or non-manual work.[573] Thus, non-management production line workers and non-management employees in maintenance, construction, and similar occupations who perform work involving repetitive operations with their hands, physical skill, and energy (such as carpenters, electricians, mechanics, plumbers, craftsmen, operating engineers,

[566] DLS Opinion Letter MW-2008-004 (July 14, 2008); *Litz v. St. Consulting Group Inc.*, 772 F.3d 1 (1st Cir. 2014).

[567] As discussed above, the now-enjoined DOL 2016 Final Rule would have increased this amount to $134,004 and would be scheduled to increase automatically every three years, starting on January 1, 2020. 29 C.F.R. § 541.601(a)-(b).

[568] Under the DOL 2016 Final Rule, this amount would have remained equal to the minimum salary threshold for executive, administrative, and professional employees ($913.00) and would have changed as that amount changed, based on the 40th percentile benchmark discussed above. 29 C.F.R. § 541.601(b).

[569] 29 C.F.R. § 541.601; DOL Wage & Hour Fact Sheet #17H (July 2008).

[570] 29 C.F.R. § 541.601(c).

[571] *Id.*

[572] *Id.*

[573] 29 C.F.R. § 541.601(d).

longshoremen, and construction workers) are not exempt under this statute even if they satisfy the high salary threshold.[574]

The required total annual compensation of $100,000 or more may consist of commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned during a 52-week period, but does not include credit for board or lodging, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.[575] If an employee fails to earn $100,000 in the year—for example, if a commissioned employee receives less in commissions than anticipated—the employer may make one payment to the employee during the last pay period, or within one month after the end of the 52-week period, to bring the employee's total annual compensation to at least $100,000.[576]

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. Accordingly, employers must confirm that an employee is exempt from both the state and federal requirements to avoid liability for overtime pay. The DOL 2016 Final Rule does not impact outside sales employees.

a. Federal Outside Sales Exemption

The FLSA exempts outside sales employees from both its overtime and minimum wage requirements.[577] To qualify for this exemption, an individual must satisfy two criteria: (1) the employee must be employed either to make sales or to obtain orders or contracts for services or for the use of facilities;[578] and (2) the employee must be customarily and regularly engaged away from the employer's place or places of business.[579]

With respect to the first criteria, "making sales" can include any "sale, exchange, contract to sell, consignment for sale, shipment for sale," or other transaction involving goods, and can also include the transfer of property titles.[580] Obtaining orders or contracts for services or for the use

[574] *Id.*

[575] 29 C.F.R. § 541.601(b)(1).

[576] 29 C.F.R. § 541.601(b)(2).

[577] 29 U.S.C. § 213(a)(1).

[578] 29 C.F.R. § 541.500(a).

[579] *Id.*

[580] 29 C.F.R. § 541.501(b). In *Christopher v. SmithKline Beecham Corporation*, the U.S. Supreme Court rejected the argument that pharmaceutical sales representatives do not *sell* drugs, but instead promote them, because they are prohibited by law from

of facilities includes but is not limited to selling radio or television air time, soliciting advertisements for publications, and soliciting railroad freight.[581]

Regarding the second requirement, the employer's place of business is not limited to the employer's factory, retail facility, or office. Rather, an employer's place of business is defined broadly to include any fixed location, such as the employee's home, if the employee regularly conducts sales activities there.[582] Thus, the employee must routinely conduct sales activities at some location away from the fixed sites maintained by the employer, such as at the customers' homes or places of business or at a location maintained by a third party.[583]

Further, to meet the requirement that an employee be "customarily and regularly" engaged away from the employer's office, the employee must work outside the employer's place of business more than occasionally, but this does not mean that those activities must be performed more than once a week or even every week.[584] In fact, the DOL has found that leaving the employer's place of business for one to two hours a day, once or twice a week may be sufficient.[585] At least one court has adopted the DOL's view of what it means to "customarily and regularly" work away from the employer's place of business in a case concerning home sales employees who claimed that they were not properly classified as exempt outside sales employees because they spent some time working from temporary sales offices maintained by their employer.[586] Unlike the white collar exemptions, there is no salary basis requirement for outside salespersons under the FLSA.

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selling prescription products directly to physicians or patients. ___ U.S. ___, 132 S. Ct. 2156, 2173-74 (2012). The Court found that the outside sales exemption requires a "functional, rather than a formal, inquiry [] that views an employee's responsibilities in the context of the particular industry in which the employee works," and concluded that a pharmaceutical sales representative's work is "tantamount to a sale" in the pharmaceutical industry. *Id.*

[581] 29 C.F.R. § 541.501(c).

[582] 29 C.F.R. § 541.502 (stating that "any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business"). In addition, sales employees who occasionally telephone customers or meet with them at the employer's offices do not lose their FLSA exemption so long as that conduct is incidental to or in conjunction with the employee's bona fide outside sales activities. DOL Wage & Hour Opinion Letter FLSA2009-28 (Jan. 16, 2009) ("Activities such as making phone calls, sending e-mails, and meeting with clients in the office are considered exempt if performed incidental to or in conjunction with the agent's outside sales activities.").

[583] 29 C.F.R. § 541.502 (listing customer's place of business or home as examples of locations that are "away from the employer's place or places of business"). The classification of residential real estate sales jobs illustrates the distinction between the employer's place of business and those locations that are considered "away from" the employer's place of business. In analyzing the exempt status of such positions, the DOL and the courts have focused on whether the sales employees regularly leave a fixed location to meet clients and prospects at the place of the sale. Home sales employees operating from temporary sales offices in residential subdivisions are engaged "away from" their employer's place of business when they show available lots within the subdivision to prospective buyers because the "units" are products for sale, rather than the employer's place of business. *See* DOL Wage & Hour Opinion Letter FLSA2007-1 (Jan. 25, 2007); DOL Wage & Hour Opinion Letter FLSA2007-2 (Jan. 25, 2007). *See also Billingslea v. Brayson Homes, Inc.*, 2007 WL 2118990 (N.D. Ga. Mar. 15, 2007) (holding home sales employees who spent considerable amount of time performing sales work outside assigned model homes properly classified as exempt); *Tracy v. NVR, Inc.*, 599 F. Supp. 2d 359 (W.D.N.Y. 2009).

[584] DOL Wage & Hour Opinion Letter FLSA2007-2 (Jan. 25, 2007).

[585] *Id.*

[586] *See Billingslea*, 2007 WL 2118990.

b. Massachusetts Outside Sales Exemption

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, excludes outside sales from the definition of what constitutes an "occupation."[587] To qualify for this exemption, an individual must both (1) regularly sell products away from the employer's place of business; and (2) refrain from making daily reports or visits to the employer's offices.[588] While the statute does not define "daily reports" and there is no case law on this topic, a DLS opinion letter addressing this issue states that the daily reports must be in-person (and not merely electronic) in order to undermine an employee's exempt status.[589] Thus, an employee may still be exempt in Massachusetts if he or she calls or e-mails the employer every day. Attending weekly or monthly meetings at the employer's offices is also permitted because such meetings are merely "incidental to and in conjunction with" the employee's outside sales.[590]

The second Massachusetts outside sales exemption applies only to the Commonwealth's overtime pay requirements, and therefore an employee who meets the requirements of this exemption but not the Massachusetts exemption explained above must be paid at least Massachusetts minimum wage. This exemption specifically states that the Massachusetts overtime provisions are not "applicable to any employee who is employed . . . as an outside salesman or outside buyer." [591] This second exemption for outside salespersons is typically easier to meet because there is no restriction on how often sales employees may visit their employers' places of business. Because the Massachusetts exemption appears to be analogous to the federal exemption, employees who satisfy the federal outside sales exemption requirements likely satisfy this Massachusetts exemption as well. Unfortunately, little guidance is available regarding this second exemption, as the statute itself does not provide any specific criteria, nor has this exemption been interpreted in court decisions or published agency opinions.

[587] M.G.L. ch. 151, § 2. The Massachusetts minimum wage and overtime laws apply to any person employed "in an occupation." M.G.L. ch. 151, § 1 ("It is hereby declared to be against public policy for any employer to employ any person *in an occupation* in this commonwealth at an oppressive and unreasonable wage . . . .") (emphasis added).

[588] M.G.L. ch. 151, § 2. The FLSA does not have a similar requirement, so outside sales employees may make daily visits to their employers' places of business without losing their federal exemption.

[589] DLS Opinion Letter MW-2002-025 (Dec. 16, 2002).

[590] *Id.*

[591] M.G.L. ch. 151, § 1A(4).

2. Federal Commissioned Inside Sales Exemption

Under the FLSA, certain retail and service employees who work on commission are exempt from federal overtime requirements.[592] Massachusetts law does *not* contain a similar exemption for inside sales employees. Retail and service employers should consider whether employees who satisfy the federal exemption satisfy a different state exemption. To qualify for the federal exemption, 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.[593]

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;[594] 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.[595] In making the latter calculation, an employer must begin by choosing a "representative period"—ranging from one month to one year—that fairly and accurately reflects the fluctuation in the employee's commission earnings over time.[596] The employer may then calculate the proportion of the employee's pay derived from commissions over the course of the representative period to determine whether the majority of the employee's salary comes from commissions.[597] The employer is required to document its reasons for choosing that representative period in its records.[598]

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[592] 29 U.S.C. § 207(i); 29 C.F.R. § 779.414. The federal inside sales exemption was enacted to relieve employers from the requirement of paying overtime to retail and service employees who are paid primarily on commission. These employees generally work in "big-ticket" departments or establishments where commissions have traditionally been used to compensate employees. Examples include departments or establishments selling furniture, bedding and home furnishings, floor coverings, draperies, major appliances, musical instruments, radios and televisions, men's clothing, women's ready to wear clothing, shoes, corsets, home insulation, and various home custom orders. 29 C.F.R. § 779.414. Additional examples of retail and service establishments include grocery stores, coal dealers, restaurants, hotels, watch repair establishments, and barber shops. 29 C.F.R. § 779.318. *See also* DOL Wage & Hour Opinion Letter FLSA2006-33 (Sept. 14, 2006) (propane gas dealers); DOL Wage & Hour Opinion Letter FLSA2006-22 (June 23, 2006) (plumbing repair service companies); DOL Wage & Hour Opinion Letter FLSA2006-9 (Mar. 10, 2006) (health club/fitness facilities); DOL Wage & Hour Opinion Letter FLSA2005-44 (Oct. 24, 2005) (carpet and upholstery cleaning services).

[593] 29 C.F.R. § 779.411.

[594] 29 U.S.C. § 207(i)(1); 29 C.F.R. § 779.412(a). The regular rate of pay is computed by dividing the total number of hours worked into straight-time earnings for those hours. 29 C.F.R. § 779.419. For example, if an employee earns $400.00 and works forty hours, the regular rate of pay is $10.00 per hour.

[595] 29 U.S.C. § 207(i)(2); 29 C.F.R. § 779.412(b). Moreover, the commissions must be earned as part of a bona fide commission plan. *See Crawford v. Saks & Co.*, 2016 WL 3090781, at *5 (S.D. Tex. June 2, 2016) (employing four-factor test to find that commission plan where salespersons' pay exceeded draws between 21 and 35 percent of time was bona fide plan).

[596] 29 C.F.R. § 779.417.

[597] *Id.*; 29 C.F.R. § 779.414.

[598] 29 C.F.R. § 779.417(d).

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.[599] However, these employees must still be paid minimum wage. In general, the Massachusetts motor carrier exemption closely tracks the Motor Carrier Act (MCA) exemption under the FLSA and thus a review of federal law will provide the parameters for the Massachusetts motor carrier exemption.[600] Massachusetts also has a second exemption that applies to common carriers of passengers by motor vehicle, which is discussed below.[601]

a. Federal Motor Carrier Act Exemption

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.[602] 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.[603]

Under the FLSA, "drivers" are those who operate motor vehicles in the course of interstate or foreign commerce.[604] An employee may perform other job duties and still qualify as a driver because the regulations explicitly recognize that "even full-duty drivers devote some of their working time to activities other than such driving."[605] "Drivers' helpers" are those who are required to ride on a motor vehicle at least part of the time and whose work impacts the safety or operation of the truck.[606] An employee who loads trucks but does not ride on them does not qualify as a helper.[607] Under federal law, "loaders" are those with responsibility "for exercising judgment and discretion in planning and building a balanced load or in placing, distributing, or securing the pieces of freight in such a manner that the safe operation of the vehicles on the highways in interstate or foreign commerce will not be jeopardized."[608] Loaders may also be

[599] 29 U.S.C. § 213(b)(1); 29 C.F.R. § 782.1 *et seq*.; M.G.L. ch. 151, §§ 1A(8) and (11).

[600] DLS Opinion Letter MW-2002-008 (Feb. 26, 2002).

[601] *See* M.G.L. ch. 151, § 1A(11); M.G.L. ch. 159A.

[602] 29 U.S.C. § 213(b)(1); 29 C.F.R. § 782.1 *et seq*. While the FLSA exempts loaders and mechanics from overtime pay requirements, the Massachusetts motor carrier exemption does not. DLS Opinion Letter MW-2002-008 (Feb. 26, 2002) ("The state exemption, M.G.L. c. 151, § 1A(8), applies only to a subset of these workers: 'a driver or helper on a truck.'").

[603] DOL Wage & Hour Fact Sheet #19 (Nov. 2009). Drivers of passenger vehicles are exempt if their vehicles are (1) designed or used to transport more than eight passengers, including the driver, for compensation; or (2) designed or used to transport more than fifteen passengers, including the driver, without compensation. *Id*.

[604] 29 C.F.R. § 782.3.

[605] 29 C.F.R. § 782.3(a).

[606] 29 C.F.R. § 782.4.

[607] *See id*.

[608] 29 C.F.R. § 782.5(a).

involved with unloading and transferring freight, so long as they are primarily responsible for safely loading trucks.[609] "Mechanics" are defined as those employees who keep vehicles in safe working condition.[610]

Employees who fall within one of the four categories set forth above may be completely exempt from the FLSA's overtime requirements during any workweek in which they perform duties that directly affect the safe operation of commercial vehicles, even if those duties are not their primary function.[611]

The federal MCA exemption also requires that goods be moved in interstate commerce.[612] Work involves the transport of goods in interstate commerce when it is directly linked to the movement of such goods across state lines or national borders.[613] However, a driver need not actually cross into another state to be exempt if his or her employer can show that the work was part of a continuity of movement from the origin of the shipment to its destination in another state or country.[614] Even where goods are shipped from their origin to an in-state storage facility, with no fixed and persisting destination at the time of shipment, their transport may still qualify as interstate commerce if, among other things, "(1) the shipper, although it did not have to have lined up its ultimate customers when the product arrived, based its determination of the total volume to be shipped on projections of customer demand that have some factual basis; (2) no processing or substantial product modification of substance occur[red] at the warehouse; (3) while in the warehouse, the merchandise [wa]s subject to the shipper's control and direction as to the subsequent transportation; and (4) the shipper or consignee [was responsible for] the ultimate payment for transportation charges even if the warehouse or distribution center directly pays the transportation charges to the carrier."[615]

Finally, the federal exemption requires that each vehicle that an employee works with weigh a minimum of 10,000 pounds in order for that employee to be exempt from overtime.[616] That is, a

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[609] *Id.*

[610] 29 C.F.R. § 782.6.

[611] 29 C.F.R. § 782.2(b)(3).

[612] The Massachusetts motor carrier exemption is also limited to employees moving goods in interstate commerce. M.G.L. ch. 151, § 1A(8).

[613] 29 C.F.R. § 782.7(a).

[614] 29 C.F.R. § 782.7(b)(1); *see Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 223 (2d Cir. 2002) ("Even if a carrier's transportation does not cross state lines, the interstate commerce requirement is satisfied if the goods being transported within the borders of one State are involved in a 'practical continuity of movement' in the flow of interstate commerce.") (quoting *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943)).

[615] *Collins v. Heritage Wine Cellars, Ltd.*, 589 F.3d 895, 899-900 (7th Cir. 2009); *see also* DOL Wage & Hour Opinion Letter FLSA2005-10 (Jan. 11, 2005) (finding motor carrier exemption applicable under revised DOT Guidelines for jurisdiction under the Motor Carrier Act, 57 Fed. Reg. 19812, May 8, 1992, which include the four *Collins* factors).

[616] *See* 29 U.S.C. § 213(b)(1); 29 C.F.R. § 782.1 *et seq.* Effective August 10, 2005, Congress changed the definition of a "motor carrier" to add this 10,000 pound weight component to the definition and clarify that the poundage requirement must be met on a truck-by-truck basis.

driver might operate a 10,001 pound truck one day and be exempt from overtime, but he or she might operate a 9,000 pound truck the next day and be entitled to overtime pay.

b. Massachusetts Motor Carrier Exemption

The primary difference between the Massachusetts motor carrier exemption and the corresponding federal exemption is that, in Massachusetts, the exemption covers a narrower group of employees. Specifically, the Massachusetts exemption applies only to drivers and drivers' helpers—unlike the federal exemption, which also includes loaders and mechanics.[617] Aside from this difference, the Massachusetts exemption closely tracks the federal, and the DLS has stated that the two exemptions are otherwise identical.[618] Further, even though Massachusetts excludes employees other than drivers or drivers' helpers, truck loaders who spend as little as 5 percent of their time riding trucks and assessing the loads for safety purposes qualify as "drivers' helpers" under the Massachusetts exemption because these employees fit within the Commonwealth's broad definition of the term.[619]

c. Massachusetts Common Carrier Exemption

In addition to the Commonwealth's motor carrier exemption, Massachusetts also exempts employees of businesses "licensed and regulated pursuant to chapter [159A]" from its overtime requirements.[620] This additional exemption covers common carriers operating some passenger vehicles, including public transportation, charters, and other for-hire passenger vehicles.[621] The statute is not a blanket exemption that covers all employees within a licensed business.[622] Only employees operating vehicles covered by the statute qualify for the exemption.[623] An employer may have exempt and non-exempt drivers based on the vehicle they drive.[624]

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[617] *See* M.G.L. ch. 151, § 1A(8); DLS Opinion Letter MW-2002-008 (Feb. 26, 2002) (explaining that Massachusetts exemption is limited to "drivers or helpers on trucks" and therefore excludes loaders and mechanics); DLS Opinion Letter MW-2002-022 (Aug. 6, 2002) (maintaining that dock workers who do not spend any time driving on trucks are loaders and therefore are not exempt from Massachusetts overtime requirements even though their duties affect motor vehicle safety).

[618] DLS Opinion Letter MW-2002-008 (Feb. 26, 2002) ("The only substantive difference between the Massachusetts state exemption and the FLSA exemption . . . is in the employees covered by the exemption."); DLS Opinion Letter MW-2002-025 (Dec. 16, 2002) (noting that Massachusetts exemption closely tracks exemption found under federal law and thus would be interpreted in same manner). While the DLS has not explicitly adopted the FLSA's 10,000 pound requirement, it seems likely that it would do so given the language in these opinion letters.

[619] *See* 29 C.F.R. § 782.2(b)(3); DLS Opinion Letter MW-2003-005 (Mar. 17, 2003).

[620] M.G.L. ch. 151, § 1A(11).

[621] *See* M.G.L. ch. 159A, § 1.

[622] *Reis v. Knight's Airport Limousine Serv.*, 33 Mass L. Rptr. 39, 2014 Mass. Super. LEXIS 175, at *9 (Mass. Super. Ct. Dec. 2, 2014); *Casseus v. E. Bus Co.*, 33 Mass. L. Rptr. 362, 2016 WL 3344717, at *2 (Mass. Super. Ct. June 4, 2016) (drivers who transported children to school for M.G.L. ch. 159A licensed charter company were not covered by exemption because 159A did not cover school-related charter work).

[623] *Reis*, 2014 Mass. Super. LEXIS 175, at *9.

[624] *Id.*

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. In addition, while the FLSA exempts such establishments from both its minimum wage and overtime requirements, Massachusetts law provides an exemption only from overtime payments. Therefore, unless an employee qualifies for a separate exemption from minimum wage under state law, seasonal employers must pay their employees at least the Massachusetts minimum wage.

a. Federal Seasonal Exemption

The FLSA exempts employees of certain amusement or recreational establishments that operate on a seasonal basis from both its minimum wage and overtime requirements.[625] To qualify, the establishment must be both recreational *and* seasonal.[626] An amusement or recreational facility is one that the public frequents for its amusement or recreation.[627] Whether a business meets this criteria depends on the employer's principal activities and not on the nature of the work performed by the employee.[628]

To qualify as a "seasonal" establishment, a business must meet one of two criteria: (1) it must not operate for more than seven months in any calendar year; or (2) during the preceding calendar year, its average receipts for any six months must have been less than one-third of its average receipts for the other months of the year.[629] Under the seven-month test, the business must demonstrate that it "operates" for not more than seven months per year, but it need not shut down completely or terminate every employee during the remaining five months.[630] If an establishment meets all the requirements for the seasonal exemption, it is exempt from the FLSA's minimum wage and overtime requirements, even if it is owned by a larger business that does not qualify in its entirety.[631] However, a separate business that operates within a recreational or seasonal establishment (e.g., a concessionaire leasing space at an amusement park) will not qualify for this

[625] 29 U.S.C. § 213(a)(3).

[626] *See, e.g., Brennan v. Texas City Dike & Marina, Inc.*, 492 F.2d 1115 (5th Cir. 1974), *cert. denied*, 419 U.S. 896 (1974).

[627] *See Hill v. Delaware N. Cos. Sportservice*, 838 F.3d 281, 290 (2d Cir. 2016) (quoting 29 C.F.R. § 779.385); *see also Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590 (11th Cir. 1995).

[628] *See Gibbs v. Montgomery Cnty. Agric. Soc'y*, 140 F. Supp. 2d 835 (S.D. Ohio 2001).

[629] 29 U.S.C. § 213(a)(3). "Average receipts" have been defined using the accrual accounting method, *Adams v. Detroit Tigers*, 961 F. Supp. 176 (E.D. Mich. 1997); and as monies actually received by the establishment regardless of the accounting method used to track receipts, *Bridewell v. Cincinnati Reds*, 155 F.3d 828 (6th Cir. 1998) (*Bridewell* II).

[630] *Compare Jeffrey*, 64 F.3d at 595 (applying exemption to groundskeeper who maintained a baseball complex during the seven-month off-season) *with Bridewell v. Cincinnati Reds*, 68 F.3d 136 (6th Cir. 1995) (*Bridewell* I) (declining to apply exemption to a business that employed 120 out of 700 employees year-round because the business was deemed to operate year-round as a result).

[631] DOL Wage & Hour Opinion Letter FLSA2009-5 (Jan. 14, 2009) (lifeguards employed at town beach that was open only seven months each year were exempt because the beach qualified as seasonal establishment even though entire municipality did not).

exemption unless it independently meets all the criteria for the seasonal exemption.[632] Once a business qualifies for the exemption, employees performing routine work that is incident to its operation are exempt for the entire year.[633]

b. Massachusetts Seasonal Exemptions

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.[634] 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.[635] A business is "seasonal in nature" if it is only open during a discrete season and offers no programs, closes the facilities, and retains only maintenance employees in its off season.[636] As with the federal exemption, once a business qualifies for one of the Massachusetts seasonal exemptions, an employee performing routine work that is incident to its operation is exempt for the entire year.[637]

5. Blanket Exemptions for Certain Businesses

Massachusetts overtime law provides blanket exemptions for employees of certain types of businesses.[638] Because the FLSA does not contain any similar blanket exemptions, Massachusetts employers in the industries listed below must find an applicable federal exemption before denying

[632] DOL Wage & Hour Opinion Letter FLSA2009-11 (Jan. 15, 2009). The DOL found that a concessionaire at a privately owned recreational establishment did not qualify for the exemption because restaurants are not meant for amusement or recreation, and the restaurant and the qualifying establishment were separate legal entities. *Id.* Businesses are not "single entities" if (1) there is physical separation from other activities; (2) they functionally operate as separate units with separate records and bookkeeping; and (3) there is no interchange of employees between units. *Id*. *See also Hill*, 838 F.3d at 296 (applying exemption where company is a "concessionaire," "which Congress intended to exempt if it also meets one of the seasonality tests.").

[633] DOL Wage & Hour Opinion Letter FLSA2000 (May 23, 2000).

[634] M.G.L. ch. 151, § 1A(20).

[635] M.G.L. ch. 151, § 1A(9); DLS Opinion Letter MW-2005-001 (Feb. 3, 2005) (defining statute's term "carried on" as meaning "open for business"). A business that operates multiple seasonal operations with distinct workforces may apply different seasonal exemptions to those workforces. DLS Opinion Letter MW-2007-003 (Sept. 24, 2007).

[636] DLS Opinion Letter MW-2005-001 (Feb. 3, 2005). Seasonal camps, exempt for summer camps operated by non-profit charitable organizations, must apply to the Department of Labor Standards annually for an overtime waiver. DLS Opinion Letter MW-2015-01 (Jan. 7, 2015). Seasonal camps may also apply for a complete exemption from minimum wage requirements. *See* Section IV.C.2.

[637] *Id.*

[638] M.G.L. ch. 151, § 1A. The blanket exemption for hospitals has also recently been interpreted by a federal court in Massachusetts. *Manning v. Boston Med. Ctr. Corp.*, 2011 WL 864798, at *3 (D. Mass. Mar. 10, 2011) (dismissing overtime claims by hospital employees based on hospital exemption). Hospitals are also exempted from coverage under M.G.L. ch. 149, § 148, if they are "supported in part by contributions from the commonwealth or from any city or town, . . . provide[] treatment to patients free of charge, or . . . [are] conducted as a public charity."

overtime wages to their employees.[639] The Massachusetts blanket exemptions apply to employees working in:

- Hotels, motels, motor courts, or similar establishments
- Restaurants[640]
- Hospitals,[641] sanatoriums,[642] convalescent or nursing homes, rest homes, or charitable homes for the aged[643]
- Gas stations
- Non-profit schools or colleges
- Summer camps operated by non-profit charitable corporations[644]

The DLS has construed these blanket exceptions only to apply to employees who physically work on the premises of the types of establishments covered by the exemption. Thus, hotel employees are exempt from overtime, but hotel banquet servers who work off-site—not "in" the hotel—are entitled to overtime pay.[645]

[639] For example, banquet servers in hotels might meet the requirements of the inside sales exemption under the FLSA. These individuals will also fall under the Massachusetts hotel exemption. These employees would still earn the Massachusetts minimum wage as discussed in Section IV.A. However, if the banquet server is a tipped employee and the employer takes the tip credit and pays the employee an hourly rate of $3.75 per hour (discussed in Section VIII), the amount of any overtime compensation earned by the employee would be based on the federal minimum wage.

[640] In *Parham v. Wendy's Co.*, the court denied employer's motion to dismiss overtime claims filed by a service technician who traveled from restaurant-to-restaurant performing maintenance duties inside and outside of restaurants, holding that the restaurant exemption applies only to employees who work *within* the restaurant, like hosts, cashiers, servers, cooks, dishwashers, and other types of jobs tied to the restaurant's operation. 2015 U.S. Dist. LEXIS 33531 (D. Mass. 2015).

[641] As discussed *supra* note 177, some hospitals are also exempt from the Payment of Wages Statute.

[642] The term "sanitorium" is not defined in the statute. However, the DLS has adopted the definition in *Webster's Third New International Dictionary* (2008), which "defines the term 'sanatorium' as '1: an establishment that provides therapy by physical agents (as hydrotherapy, light therapy) combined with diet, exercise, and other measures for treatment or rehabilitation; 2a: an institution for rest and recuperation esp. for invalids and convalescents, b: an establishment for the treatment of the sick esp. if suffering from chronic disease (as alcoholism, tuberculosis, nervous or mental disease) requiring protracted care.' [The DLS], and its predecessor, the Department of Labor and Industries, have narrowly construed this exemption." DLS Opinion Letter MW-2001-016 (Nov. 19, 2001).

[643] Massachusetts law prohibits mandatory overtime for hospital nurses exempt in emergency situations. M.G.L. ch. 111, § 226 (2012).

[644] M.G.L. ch. 151, § 1A.

[645] DLS Opinion Letter MW-2006-001 (Mar. 10, 2006).

6. Other Massachusetts Exemptions

Massachusetts law also provides the following less commonly applied exemptions:

- Garagemen[646]
- Certain janitors or caretakers of residential property
- Golf caddies
- Child actors or performers
- Newsboys
- Fishermen
- Switchboard operators in a public telephone exchange
- Seamen
- Agricultural workers[647]

While some of these exemptions have federal analogs, the requirements may differ under state and federal law, and Massachusetts employers must ensure that they meet both the state and federal exemptions before denying overtime wages to their employees.

VII. MASSACHUSETTS EQUAL PAY ACT

On August 1, 2016, Massachusetts Governor Charlie Baker signed into law major changes to the Massachusetts Equal Pay Act (MEPA).[648] The new law will take effect on July 1, 2018, and will be enforced by the Office of the Massachusetts Attorney General. Employees also will have a private right of action.

A. Law in Effect Until 2018

The Massachusetts Equal Pay Act has been in effect since 1945, but there has been minimal civil litigation enforcing it. In its current form, the law is similar to the federal Equal Pay Act, which requires equal pay for "equal work."[649] Courts therefore have not permitted employees to pursue

[646] A "garageman" is "any worker performing repair work on automobiles—be it a stand-alone repair shop or one that is part of a larger establishment such as a car dealership . . . ." DLS Opinion Letter MW-2002-014 (Apr. 30, 2002).

[647] *See id.*

[648] M.G.L. ch. 149, § 105A.

[649] 29 U.S.C. § 206(d).

complaints by comparing themselves to employees in other jobs with similar duties or qualifications.[650]

B. New Requirement: "Comparable Work"

The new Massachusetts law, in contrast, will prohibit differences in pay for "comparable work": "No employer shall discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work."[651] "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."[652] This "comparable work" standard may expand employers' obligations to ensure equal pay across different jobs in ways that are difficult to predict, as the standard is vague and, barring regulatory action to further define terms used in the statute, will have to be interpreted by courts in litigation after the new law takes effect.

"Wages" are defined broadly to include "all forms of remuneration for employment."[653]

While the Attorney General may promulgate regulations to interpret the new law, she is not required to do so, and currently there is no timetable for any such regulations to be issued.

C. New Justifications for Wage Differentials

Under the new law, 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

[650] *See, e.g., Wojciechowski v. Nat'l Oilwell Varco, L.P.*, 763 F. Supp. 2d 832 (S.D. Tex. 2011) (concluding female sales managers were not comparable under Equal Pay Act to male account managers who had different duties); *Renstrom v. Nash Finch Co.*, 787 F. Supp. 2d 961 (D. Minn. 2011) (concluding female grocery buyer did not perform equal work as males in same position who were responsible for more distribution centers).

[651] M.G.L. ch. 149, § 105A(a) (eff. 2018).

[652] *Id.*

[653] *Id.*

- 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[654]

An employee's previous wage or salary history is not a defense to a claim of wage discrimination, and unlike federal law, the new Massachusetts statute has no catchall defenses for wage differentials based "any factor other than sex."[655]

The new law also prohibits employers from reducing the wages of any employee in order to eliminate wage differentials.[656]

D. New Prohibition on Salary History Requests

In one of its unique provisions, the new law will prohibit Massachusetts employers from requesting the compensation history of a prospective employee prior to making an offer, unless the prospective employee has "voluntarily" disclosed such information.[657] This provision will require employers to revise job applications that request prior compensation information. At a minimum, such applications will have to note that providing such information is voluntary.

E. New Prohibition on Pay Secrecy Requirements

When it takes effect, the new law will also make it unlawful for employers to prohibit employees from discussing or disclosing their own or other employees' wages.[658] Other laws currently in effect have been interpreted to provide the same prohibition.[659]

F. New Self-Evaluation Defense

The new law is also unique in that it creates an affirmative defense to liability for wage discrimination 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

[654] *Id.*

[655] 29 U.S.C. § 206(d)(1); M.G.L. ch. 149, § 105A (eff. 2018).

[656] M.G.L. ch. 149, § 105A (eff. 2018).

[657] *Id.*

[658] *Id.*

[659] In recent years, the National Labor Relations Board (NLRB) has ruled repeatedly that the National Labor Relations Act (NLRA) protects employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," including the right to discuss wages. *See, e.g., Victory II, LLC d/b/a Victory Casino Cruises*, 363 NLRB No. 167 (2016) (concluding that employer violated NLRA by maintaining confidentiality rule in employee handbook); *Schwan's Home Serv., Inc.*, 364 NLRB No. 20 (2016) (concluding that policy restricting disclosure of "information concerning customers, vendors or employees" was unlawful because employees may understand policy to prohibit sharing of employee information with each other or third parties).

commencement of the action; and (2) made "reasonable progress" toward eliminating pay differentials uncovered by the evaluation.

The new law does not specify what is required to establish that an audit is "reasonable" or what constitutes "reasonable progress" in remediating any disparities revealed by such audits. These standards are likely to be addressed by the courts after the effective date of the new law and may also be the subject of guidance from the Attorney General.

Evidence of an employer's self-evaluation or remedial steps undertaken in accordance with the new law is not admissible as evidence of any violation *of Massachusetts law* in some circumstances.

While the new self-evaluation defense may have advantages, it also creates risks. Any evaluation used to substantiate a defense under state law might be used against a company in litigation under federal law or the laws of other states that provide no similar defense.

G. Damages

As with the existing law, employers who violate the new law will be liable for unpaid wages, an equal amount as liquidated damages, and attorneys' fees. However, employers will be liable for damages over a longer period of time, as the new law extends the statute of limitations from the existing one-year period to three years after the date of the alleged violation. A pay violation occurs each time an employee is paid.

The damages or penalties for a prohibited salary history request are unclear. The Attorney General may promulgate regulations to address this uncertainty before the law takes effect in 2018.

VIII. TIPS AND SERVICE CHARGES

The Massachusetts Tip Statute governs two key areas of employee tipping. It defines the charges that are considered tips, gratuities, or service charges, and it regulates which employees may receive them.[660]

The Massachusetts Tip Statute has increased in complexity over the years. When first enacted in 1952, the statute consisted of a single sentence that forbade employers from taking any share of tips earned by food and beverage service employees.[661] The Massachusetts legislature modified the statute several times after its enactment—in 1966 imposing fines for violations of the law,[662] in 1980 expanding the statute's coverage beyond tips to include fees labeled as "service charges"

[660] M.G.L. ch. 149, § 152A.

[661] M.G.L. ch. 149, § 152A; *Moore v. Barnsider Mgmt. Corp.*, 21 Mass. L. Rptr. 313, 2006 WL 2423328, at *2 (Mass. Super. Ct. Aug. 15, 2006) (discussing history of the Massachusetts Tip Statute).

[662] M.G.L. ch. 149, § 152A (1966).

(a term which the statute failed to define),[663] and in 1983 directing businesses that impose service charges to pay them to employees who have provided service in proportion to the amount of service they provided.[664] Up to that point, the law only governed tips or service charges distributed to workers within the food and beverage service industry.

In 2004, the legislature substantially rewrote the Tip Statute.[665] Most significantly, the amended statute includes definitions of the key terms "tip" and "service charge," and it identifies three categories of employees—wait staff employees, service employees, and service bartenders—who may receive tips (to the extent an employer mandates tip-pooling or sharing) and service charges. Of particular note, the amendments extend protection to employees outside the food and beverage industry.

Over the last decade, Tip Statute litigation has increased dramatically, and a 2008 statute that imposed mandatory treble damages for certain wage and hour violations (discussed in Section XVIII.G) has prompted even more litigation. While the 2004 amendments and recent decisions have attempted to clarify the definitions of tips and service charges and who may receive them, there remain significant areas of dispute among employees and employers regarding the Tip Statute.

A. Definition of a Tip or Service Charge

Prior to the 2004 amendments, the Tip Statute governed both "tips" and "service charges," but it did not define either term.[666] As a result, litigation over what constitutes a tip or service charge increased. Because these terms were undefined, courts examined how an amount in question was labeled to determine its status. For instance, in a case applying the pre-2004 statute, the Massachusetts Appeals Court held that the Tip Statute governed any fee labeled a "service charge" regardless of the employer's intentions or its representations to customers that the charge is not a tip.[667] Conversely, another court ruled that if an employer charged an administrative fee that was not labeled a service charge, gratuity, or tip, then the Tip Statute did not govern the fee.[668]

[663] M.G.L. ch. 149, § 152A (1980).

[664] M.G.L. ch. 149, § 152A (1983).

[665] M.G.L. ch. 149, § 152A.

[666] *See* M.G.L. ch. 149, § 152A.

[667] *Cooney v. Compass Grp. Foodservice*, 69 Mass. App. Ct. 632, 634, 870 N.E.2d 668 (2007) (finding employer liability for failing to treat service charges as tips, where charges were used to preserve an historic building, even though employees never expected to take a share and inquiring customers were informed of how fee was used). *See also Michalak v. Boston Palm Corp.*, 18 Mass. L. Rptr. 460, 2004 WL 2915452, at *1 (Mass. Super. Ct. Sept. 17, 2004) (finding employer liability for failing to distribute amount labeled on bill as service charge to employees whose primary duty was service of food and beverage, although both contract language and servers informed customers that service charges were not fully remitted to service employees).

[668] *Williamson v. DT Mgmt., Inc.*, 17 Mass. L. Rptr. 606, 2004 WL 1050582, at *11 (Mass. Super. Ct. Mar. 10, 2004) (finding that a fee labeled "administrative fee" was not a service charge under the statute).

The current 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."[669] Tips include cash and amounts designated on credit card receipts, with no distinction made between the two under the statute.[670] 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."[671]

By explicitly tying the definitions of tips and service charges to the individuals for whom they are intended, the Tip Statute exempts from its scope any money that patrons explicitly leave for or give directly to employees who are *not* wait staff employees, service employees, or service bartenders.[672] As a result of the statute's amended language, courts judging whether a mandatory charge is a service charge not only consider what a fee is called, but also whether a customer would *reasonably expect* that the fee is charged in lieu of or in addition to a tip or gratuity for employees covered by the statute.[673] Applying the statute's definitions, several courts have found that "station fees" charged at banquet events for culinary stations or bars are not tips as a matter

[669] M.G.L. ch. 149, § 152A(a).

[670] *Id.*

[671] *Id.* (emphasis added). While the Tip Statute defines a service charge as "a fee charged *by an employer* to a patron in lieu of a tip," the SJC has held that a company can be liable for retaining service charges even if the company was not the "employer" of the service employees in question. *DiFiore v. Am. Airlines, Inc.*, 454 Mass. 486, 497, 910 N.E.2d 889 (2009) ("[A] 'service charge' need not be charged by an employer, but may be imposed by any person or entity."). *See* Section VIII.F.

[672] While the Tip Statute treats service charges like tips in requiring their distribution to certain types of employees, service charges are *not* tips under the FLSA. *See* 29 U.S.C. § 203 *et seq.*; 29 C.F.R. § 531.50 *et seq.* Also, unlike the Massachusetts Tip Statute, it is not clear that the FLSA applies to tips at all *unless* the employer is taking the tip credit, as described in Section VIII.E. *See* 29 U.S.C. § 203 *et seq.*; 29 C.F.R. § 531.50 *et seq.*; s*ee Cumbie v. Wendy Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010) (holding FLSA did not apply to tips where employer had not elected to take the tip credit). In 2011, the DOL issued an amendment to the regulations, clarifying that the FLSA *does* apply to all tips. 29 C.F.R. § 531.52. The DOL amendment explains that tips are the property of the employee "whether or not the employer has taken a tip credit." *Id.* However two federal district courts ignored the 2011 regulations in light of the Ninth Circuit's decision in *Cumbie*, and held that the FLSA only applies to tips if an employer takes the tip credit. *See Cesarz v. Wynn Las Vegas, LLC*, 2014 WL 117579, at *3 (D. Nev. Jan. 10, 2014); *Oregon Rest. & Lodging v. Solis*, 948 F. Supp. 2d 1217, 1218, 1226 (D. Or. 2013). Recently, however, the Ninth Circuit, upheld the validity of the DOL's 2011 amendment and its extension of tip pooling restrictions to employers that do not use a tip credit. *Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1090 (9th Cir. 2016). Thus, the current state of law with respect to the application of the FLSA to tips is evolving.

[673] M.G.L. ch. 149, § 152A(a). In *Mouiny v. Commonwealth Flats Development Corporation*, the court held that station fees were not service charges because customers could not reasonably expect these fees to be given to wait staff. *Mouiny*, No. SUCV2006-1115-BLS1, at 14 (Mass. Super. Ct. Aug. 18, 2008) (Gants, J.) ("It is doubtful that any reasonable patron would expect that a 'station fee' would be paid directly to the wait staff . . . ."). The court concluded that the pre-2004 version of the statute simply did not apply to a fee that was not called a service charge, but also held that "as a matter of law, under both versions of the [Tip Statute], these station fees were not gratuities and were not required to be distributed among the servers." *Id.* at 13. In *Hernandez v. Hyatt Corporation*, the court found that "no reasonable patron would expect that the [station fee] . . . would be remitted to the wait staff in lieu of or in addition to a tip." *Hernandez*, No. SUCV2005-0569-BLS1, at 7 (Mass. Super. Ct. May 4, 2009) (Hinkle, J.).

of law where no customer would reasonably believe that they were distributed to protected employees.[674]

While many employers add disclaimers to their invoices explaining which, if any, fees are remitted to wait staff, this is not the only factor that courts consider in assessing a customer's reasonable expectations. Several courts have held that where a banquet menu clearly lists additional flat fees separate from gratuities, no reasonable patron would expect those fees to be remitted to wait staff in lieu of or in addition to a tip.[675]

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]."[676] The Massachusetts Appeals Court has interpreted this provision to mean that even where a charge is labeled "administrative fee," the employer still must provide an explicit disclaimer notifying customers that the fee is not a service charge in order to avoid liability.[677] Thus, simply indicating that a fee is a house fee or an administrative fee is not sufficient to distinguish it from a service charge.[678]

B. The Sharing of Tips and Service Charges

While the prior iterations of the Tip Statute have been interpreted as protecting only those employees whose "primary duty is to engage in the service of food and beverage,"[679] the law as amended in 2004 has established three categories of employees who are eligible to share in tips and service charges:

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[674] *Masiello v. Marriott Int'l, Inc.*, No. 2006–05109, 2010 WL 8344105 at *2-3 (Mass. Super. Ct. May 11, 2010) (finding fees charged for banquet stations were not tips because the hotel made clear that tips for banquet station employees were not included in the price and differentiated them from the service charges that were distributed among wait staff); *Hernandez*, No. SUCV2005-0569-BLS1 (Mass. Super. Ct. May 4, 2009); *Mouiny*, No. SUCV2006-1115-BLS1 (Mass. Super. Ct. Aug. 18, 2008).

[675] *See supra* note 673 and accompanying text; *DePina v. Marriott Int'l, Inc.*, No. SUCV2003-5434-G, at 17 (Mass. Super. Ct. July 28, 2009) (Henry, J.) ("plaintiffs have no reasonable expectation of proving that the failure to include station fees in the service charge pool violated the [Tip Statute]" where station fees were listed on checks as "separate and distinct from the percentage based service charge").

[676] M.G.L. ch. 149, § 152A(d).

[677] *Bednark v. Catania Hospitality Grp., Inc.*, 78 Mass. App. Ct. 806, 815-17, 942 N.E.2d 1007 (2011) (holding "administrative fee" label "neither indicates whether all or any part of the fee is . . . a gratuity nor necessarily comports with customer expectations"), *further appellate review denied*, 459 Mass. 1110, 947 N.E.2d 42 (2011).

[678] The way in which an employer must inform customers that an "administrative" or "house" fee is not a tip or service charge is unclear. In *DiFiore v. American Airlines, Inc.*, the federal District Court for the District of Massachusetts held that despite several signs posted adjacent to bag-check podiums that read "U.S. Domestic Flights: $2 per bag. Gratuity not included," a reasonable passenger could have thought the two dollar fee was given to airline skycaps as a tip. 561 F. Supp. 2d 131, 136 (D. Mass. 2008), certified question answered, 454 Mass. 486 (2009). Similarly, in *Carpaneda v. Domino's Pizza, Inc.*, Domino's Pizza charged customers a $2.50 "delivery charge," that Domino's did not give to delivery drivers. 991 F. Supp. 2d 270, 271 (D. Mass. 2014). When a customer placed an order online, Domino's provided a disclaimer at the bottom of the page that provided that the delivery charge did not constitute a tip. *Id.* at 272. The court denied Domino's Pizza's motion to dismiss and found that, despite the disclaimer, a reasonable customer could interpret the delivery charge as a tip. *Id.* at 274.

[679] *See, e.g.*, *Williamson*, 2004 WL 1050582, at *11.

- 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."[680]

Setting out these specific categories has spurred substantial litigation regarding which employees are legally permitted to share in tips, and it has impacted numerous industries, including restaurants, hotels, airline skycap services, sports arenas, and audiovisual technician services.[681]

The amended language is problematic because it has expanded the mandate beyond tips and service charges earned by "wait staff" employees to include certain "service employees who did not provide either food or beverage service."[682] Thus, if a restaurant employs staff members who are not responsible for serving food and beverages to customers *but nonetheless regularly provide some level of direct service to guests and customarily receive tips or gratuities*, an employer might reasonably argue that those staff members are eligible "service employees."[683] The statute, however, narrows the "service employee" category to exclude staff who help provide direct service to customers *if they also perform managerial responsibilities*.[684] Because the statute fails

[680] M.G.L. ch. 149, § 152A(a). Notably, the service bartender definition does not include the managerial responsibility prohibition. *Id.*

[681] *See, e.g.*, *Mouiny*, No. SUCV2006-1115-BLS1 (Mass. Super. Ct.) (hotel); *Williamson*, No. SUCV2002-1827-D (Mass. Super. Ct.) (hotel); *Fernandez v. Four Seasons Hotels, Ltd.*, No. SUCV2002-4689-F (Mass. Super. Ct.) (hotel); *Rose v. Ruth's Chris Steak House, Inc.*, No. 07-12166-WGY (D. Mass.) (restaurant); *Kelly v. Sage Rest.*, No. SUCV2008-4230F (Mass. Super. Ct.) (restaurant); *Benoit v. The Federalist, Inc.*, No. SUCV2004-3516-B (Mass. Super. Ct.) (restaurant); *DiFiore*, No. 07-10070-WGY (D. Mass.) (skycaps); *Travers v. Jet Blue Airways Corp.*, No. 08-10730 (D. Mass.) (skycaps); *Mitchell v. U.S. Airways, Inc.*, No. 08-10629 (D. Mass.) (skycaps); *Brown v. United Air Lines, Inc.*, No. 08-10689 (D. Mass.) (skycaps); *Hayes v. Aramark & Boston Red Sox*, No. 08-10700 (D. Mass.) (food services at sports arena); *DiIorio v. Ritz-Carlton Hotel Co., LLC*, No. SUCV2007-0131-G (Mass. Super. Ct.) (audiovisual technicians). The First Circuit has taken the position that the Tip Statute is preempted by the Airline Deregulation Act of 1978, which vests exclusive jurisdiction in the federal government to regulate most aspects of air travel. *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011) (holding Tip Statute "directly regulates how an airline service is performed and how its price is displayed to customers" and is therefore preempted), *cert. denied*, 132 S. Ct. 761 (2011); *Overka v. Am. Airlines, Inc.*, 790 F.3d 36, 41 (1st Cir. 2015), cert. denied, 136 S. Ct. 372 (2015) (applying *DiFiore* and affirming finding that skycaps' Tip Statute claims were preempted by the American Deregulation Act).

[682] *Mouiny*, No. SUCV2006-1115-BLS1, at 11 (Mass. Super. Ct. Aug. 18, 2008).

[683] *See id.* at 11-12 (banquet captain may meet service employee definition).

[684] *See* M.G.L. ch. 149, § 152A(a) (emphasis added).

to define "managerial responsibilities," significant controversy remains over what types of duties render a "service employee" ineligible for protection under the law.

In an advisory notice, the Office of Massachusetts Attorney General has indicated that it will "look to" the federal definition of "executive" in interpreting the Tip Statute, stating that "these factors *may be relevant* in determining whether a worker has managerial responsibility."[685] This approach would define a manager as one who makes or influences decisions regarding scheduling or assigning others to their posts, performs supervision, directs other employees, hires or fires other employees, and regularly exercises independent judgment.[686] It remains unclear, however, whether the federal definition is compatible with the Commonwealth's Tip Statute; the Attorney General's advisory merely states that it "may be relevant."[687]

Three Massachusetts courts have examined the issue, concluding that managerial responsibilities are most clearly evident when a staff member must direct the work of other employees. In *Mouiny v. Commonwealth Flats Development Corporation*, the court held that banquet captains—though they wore uniforms, carried radios, had access to computers, communicated with managers, and assigned tasks to other servers—did not necessarily perform managerial duties.[688] The court found that the proper inquiry was whether the banquet captains "directed the work of [other] employees . . . *sufficiently* to characterize them as having managerial responsibility."[689] Applying similar reasoning in *Godt v. Anthony's Pier 4, Inc.*, the court declared that it was unclear whether wine stewards had managerial responsibilities when they handled employee scheduling, set floor plans, fielded customer complaints, and corrected the work of other wait staff.[690] The court found "a material dispute of fact as to whether the duties that the wine stewards perform in addition to serving wine are *sufficiently* supervisory or managerial so as to

[685] Massachusetts Attorney General Advisory 2004/3, at 2 n.3 (citing 29 C.F.R. § 541.1) (emphasis added).

[686] *Id.* One court has applied this definition to the Tip Statute, finding that although none of the other elements were present, there was a genuine issue of material fact as to whether banquet captains supervised the work of servers sufficiently to find that they had managerial responsibilities. *Mouiny*, No. SUCV2006-1115-BLS1 (Mass. Super. Ct. Aug. 18, 2008) (denying summary judgment). Another court found that banquet captains had sufficient managerial responsibility to render their participation in a tip pool improper where they directed the work of servers during banquet events, even though it was "undisputed that [the banquet captains] did not influence employment shifts, hours, or decisions . . . ." *DePina*, No. SUCV2003-5434-G, at 15 (Mass. Super. Ct. July 28, 2009).

[687] Massachusetts Attorney General Advisory 2004/3, at 2 n.3 (citing 29 C.F.R. § 541.1). The FLSA definition of "executive" seems incompatible with the Tip Statute because the former does not designate employees as executives if they have *any* managerial responsibility, while the Tip Statute arguably does. *See* M.G.L. ch. 149, § 152A(a).

[688] *Mouiny*, No. SUCV2006-1115-BLS1, at 13 (Mass. Super. Ct. Aug. 18, 2008).

[689] *Id.* (emphasis added) (also noting that one should not "mistakenly equate 'supervisory responsibility' with 'managerial responsibility'"); *see also Belghiti v. Select Rests., Inc.*, 2014 WL 5846303, at *2 (D. Mass. Nov. 12, 2014) (on reconsideration, affirming original grant of summary judgment and finding that while banquet captains and maître d's acted like a "quarterback on a football team," there was no evidence that they performed "core management functions" such as "hiring, setting wages, maintaining records, recommending promotions, or administering discipline").

[690] *Godt v. Anthony's Pier 4, Inc.*, No. SUCV2007-3919-BLS1, at 8 (Mass. Super. Ct. Mar. 24, 2009) (Hinkle, J.) (wine stewards also accessed computers to void and change customer orders, ensured that the restaurant was running smoothly, assigned side work, issued server reports at the end of a shift, closed the restaurant, accessed the safe, locked up, set the alarm, monitored the wine stock, and issued new wait staff lockers, uniforms, and side towels).

preclude them from the tip sharing."[691] In contrast, yet citing to the *Mouiny* and *Godt* decisions, the court in *DePina v. Marriott International, Inc.* found that banquet captains had sufficient managerial responsibilities to make their participation in a tip pool improper where they "directed the work of servers and apportioned work among them" and "supervised banquet events."[692] In *Matamoros v. Starbucks Corporation*, the First Circuit upheld the decision of a federal district court, finding that shift supervisors in coffee shops who spend a majority of their time directly serving customers could not share in tips because they also performed such duties as directing employees to work stations, opening and closing the store, opening the store's safe, and handling and accounting for cash.[693] The *Matamoros* court emphasized that "if an employee has any managerial responsibility, she does not qualify as 'wait staff' eligible to participate in tips pools" under the Tip Statute.[694]

Given the courts' rulings, employers should consider carefully before extending participation in tip pools to employees with even very limited authority over their co-workers. Doing so may run the risk of litigation from other employees who believe that a supervisor is improperly sharing in their tips. Employers also should note that the law now applies outside the food and beverage industry and protects "service employees" of other occupations in which receiving tips is customary during the course of work. Such occupations include hairdressers, taxicab drivers, baggage handlers, and bellhops.[695]

C. "No Tipping" Policies

The Tip Statute is silent as to whether employers may adopt "no tipping" policies to reduce the administrative burden of accounting for and distributing tips. The SJC, however, has held that such policies are lawful.[696] In *Meshna v. Scrivanos*, the SJC found that there is nothing in the language of the Tip Statute that prohibits employers from implementing no tipping policies.[697] Rather, the Tip Statute governs what employers can do with tips actually received.[698]

If employers choose to implement no tipping policies, the policy must be "clearly communicated" to customers.[699] Such policies can be clearly communicated through signs or through instructing

[691] *Id.*

[692] *DePina*, No. SUCV2003-5434-G, at 15 (Mass. Super. Ct. July 28, 2009) (finding managerial responsibility even though it was "undisputed that [the banquet captains] did not influence employment shifts, hours, or decisions").

[693] *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 137 (1st Cir. 2012) (holding shift supervisors had managerial responsibility for purposes of the Tip Statute).

[694] *Id.* at 134 (emphasis added).

[695] Massachusetts Attorney General Advisory 2004/3.

[696] *Meshna v. Scrivanos*, 471 Mass. 169 (2015).

[697] *Id.* at 175-76.

[698] *Id.*

[699] *Id.* at 177 (finding that an employer will violate the Tip Statute if it retains tips given in contravention of no tipping policy if policy is not clearly communicated to customers).

employees to communicate the existence of the policy to customers.[700] If customers nonetheless leave tips even after being made aware of a no tipping policy, the Tip Statute does not require an employer to distribute those tips to wait staff employees.[701]

D. 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."[702] Thus, employers may require tip-pooling among a group of employees or mandate that employees share tips with other eligible employees.[703] At least one court has interpreted the Tip Statute as prohibiting employers from *ever permitting* employees to create an unlawful tip-pooling system.[704]

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]."[705] As a practical matter, tips are usually cashed out daily, while proceeds from service charges are typically included in employee paychecks.

E. 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.[706] Under Massachusetts

[700] *Id.* at 178 n.10.

[701] *Id.* at 178 (finding that any money that is left in contravention of a no tipping policy is not "given to" wait staff employees).

[702] M.G.L. ch. 149, § 152A(c).

[703] The Tip Statute requires that tips and service charges be distributed among wait staff employees, service employees, or service bartenders "*in proportion* to the service provided by those employees." M.G.L. ch. 149, § 152A(d) (emphasis added). The Statute, however, does not define "in proportion," nor does it describe how an employer must determine proportionate shares. Two courts have interpreted the proportionality requirement and held that an "estimate" of proportionality satisfies the Tip Statute. *Belghiti v. Select Rest., Inc.*, 2014 WL 1281476, at *3 (D. Mass. Mar. 31, 2014), reconsideration denied, 2014 WL 5846303 (D. Mass. Nov. 12, 2014) (rejecting employee's argument that proportion of tips should be based on actual performance each shift and holding employer's estimate system, under which servers who provided a higher level of direct customer service received a full share while employees who worked in a more limited service role received a smaller share, was lawful); *Williamson*, 2004 WL 1050582, at *11-12 (construing the pre-2004 Tip Statute and finding employer's practice of using a "level rating system," under which each employee's performance, seniority, and availability was considered, was lawful).

[704] *Moore*, 2006 WL 2423328, at *5 (finding that voluntary tip-sharing with non-service employees was lawful under previous Tip Statute, but after 2004 amendments an employer with knowledge of such arrangement must make reasonable efforts to stop the practice).

[705] M.G.L. ch. 149, § 152A(e).

[706] 29 U.S.C. § 201 *et seq.*; M.G.L. ch. 151, § 7.

law, an employer may elect to pay tipped employees the "service rate"—which, as of January 1, 2017, is $3.75 per hour.[707]

In order to pay this lower rate, commonly referred to as "taking the tip credit," the employees in question must be customarily tipped employees and the employer must provide proper notice.[708] To qualify as a "tipped employee," one must customarily receive tips of more than $30.00 per month.[709] On a weekly basis, the combination of tips and the service rate earned by the employee must meet or exceed the Massachusetts minimum wage.[710] The tipped employee may receive tips directly or through a valid tip pool.[711] If the tip pool is invalid (i.e., it includes individuals who do not qualify to receive tips under the statute), the tip credit is lost, and the employer must pay the full minimum wage.[712]

Calculation of overtime for a tipped employee, particularly where service charges are also involved, constitutes a complicated analysis that should be undertaken with the advice of counsel.[713]

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

[707] M.G.L. ch. 151, § 7; 454 C.M.R. § 27.02. Under federal law, employers may take a "tip credit" against the minimum wage when an employee earns enough tips to make up the difference between the lower rate and the standard minimum wage. 29 U.S.C. § 203(m). Federal appellate courts, in interpreting the DOL's regulations, have held that an employer may not pay the sub-minimum wage tip credit for time spent performing "general preparation and maintenance duties" if the employee spends more than 20 percent of his or her time performing such tasks. *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1075 (7th Cir. 2014) ("as long as the tipped employee spends no more than 20 percent of his workday doing non-tipped work related to his tipped work . . ., the employer doesn't have to pay the full minimum wage (that is, the minimum wage without the tip credit) for the time the employee spends doing that work"); *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 880-81 (8th Cir. 2011), *cert. denied*, 2012 U.S. LEXIS 709 (Jan. 12, 2012). In addition, federal regulations require that employers disclose specific information about their use of the tip credit. *See* 29 C.F.R. § 531.59 ("[A]n employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit of . . . [t]he amount of the cash wage that is to be paid to the tipped employee by the employer; the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and that the tip credit shall not apply to any employee who has not been informed of these requirements in this section.").

[708] *See* 454 C.M.R. § 27.03(2).

[709] 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. Under federal law, employees must receive more than $30.00 in tips each month, effectively making this the requirement. 29 U.S.C. § 203(t). The DLS has opined that "newly-hired employees who do not receive tips during their initial training period are not 'tipped employees'" and therefore must be paid at least minimum wage during their training period. DLS Opinion Letter MW-2003-012 (Nov. 24, 2003).

[710] M.G.L. ch. 151, § 1; 454 C.M.R. § 27.02.

[711] 454 C.M.R. § 27.03(2).

[712] The regulations state that "[i]f the employee is engaged in the serving of food or beverages, such a tip-pooling arrangement must conform with the requirements of M.G.L. c. 149, § 152A." 454 C.M.R. § 27.03(2). This language suggests that this provision does not apply to tipped employees engaged in services other than the serving of food and beverage, but there is no guidance from the court or DLS interpreting this language.

[713] 454 C.M.R. § 27.03(3) ("The overtime rate for a tipped employee receiving the service rate shall be computed at one and one half times the basic minimum wage, except where exempted by M.G.L. ch. 151,§ 1A.").

them that the employer will be paying the lower rate.[714] An employer must always pay at least $3.75 in hourly wages to a tipped employee, *even if the employee's tips alone exceed the Commonwealth's minimum wage of $11.00 per hour* (as of January 1, 2017).[715]

F. Liability for Violations

Both companies and individuals may be liable for violations of the Tip Statute.[716] 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."[717] Thus, the statute allows for individual liability for those having "management responsibility but no ownership stake in an enterprise."[718]

The SJC has held that a business may be liable for violating the Tip Statute even when the service workers in question are not actually its employees.[719] In *DiFiore v. American Airlines, Inc.*, American contracted with a vendor (G2 Secure Staff) to provide the airline with skycap personnel.[720] American was found liable for not paying skycaps the proceeds from a $2.00 per bag service charge that it charged to customers, even though American did not employ the skycaps. The court held that "a 'service charge' need not be charged by an employer, but may be imposed by any person or entity."[721] The court reasoned that the purpose of the Tip Statute would be undercut if a business in the service industry, such as an airline or restaurant, could escape liability by entering into a contract with a third party, such as G2, under which the third party employs workers and shares service charges collected from customers with the service entity.[722]

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[714] *Id.*

[715] DLS Opinion Letter MW-2008-001 (Jan. 8, 2008). Although the regulations addressing the tip credit and service rate only refer to tips and not service charges, the DLS (the entity with authority to interpret the minimum wage laws) has taken the position that tips and service charges are interchangeable for purposes of the minimum wage statute and tip credit. *See id.*; 454 C.M.R. § 27.03(2) ("The minimum wage rate for a tipped employee may be comprised of both (a) the service rate paid by the employer; and (b) *tips* actually received and retained by the employee.") (emphasis added). This is in contrast to federal law. Under the FLSA, while a service charge paid to an employee counts towards the minimum wage, it is not a tip and cannot be counted toward the $30.00 tip requirement. *See* 29 C.F.R. § 531.55(b) ("[S]ervice charges and other similar sums which become part of the employer's gross receipts are not tips for the purposes of the Act. Where such sums are distributed by the employer to its employees, however, they may be used in their entirety to satisfy the monetary requirements of the Act."). Rather, service charges (and mandatory gratuities) are wages under federal law and thus subject to the same tax treatment as other non-tip wages. *See* IRS Rev. Rul. 2012-18, 2012-26 I.R.B. 1032.

[716] Massachusetts Attorney General Advisory 2004/3, at 3.

[717] M.G.L. ch. 149, § 152A(a) (2004) (emphasis added).

[718] Massachusetts Attorney General Advisory 2004/3, at 3.

[719] *DiFiore*, 454 Mass. at 497.

[720] *Id.* at 488.

[721] *Id.* at 497.

[722] *Id.* at 493-94.

G. Penalties for Violations

Employees who prevail on a claim under the Tip Statute are entitled to restitution of any tips or service charges that they should have received but did not, plus 12 percent annual interest.[723]

Moreover, as discussed in depth in Section XVIII.G, employers that are found liable for violating the Tip Statute must pay the plaintiff-employee *three times* the actual damages proven in the case.[724] In addition to treble damages, the prevailing party in a Tip Statute suit may recover litigation costs and reasonable attorneys' fees.[725]

IX. POSTING REQUIREMENTS

Massachusetts employers must display posters informing employees of their rights under state and federal wage and hour laws. These include the posting requirements for days of rest, for employment of minors, and for disabled workers who are paid special minimum wages.[726]

A. General Wage and Hour Notices

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.[727] Many employers maintain a bulletin board for posting notices to employees, often in a break area, in the lunch room, or in a location adjacent to the area where employees punch in and out. The poster must state the Massachusetts minimum wage (currently $11.00 per hour for most employees),[728] 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.[729] It must

[723] M.G.L. ch. 149, § 152A(f).

[724] M.G.L. ch. 149, § 150.

[725] *See, e.g.*, *Wiedmann*, 444 Mass. at 709 n.13 (granting attorneys' fees and costs). Attorneys' fees and costs are discussed in depth in Section XVIII.

[726] Federal law requires additional postings for migrant and seasonal agricultural workers. 29 C.F.R. §§ 500.75(c) and (e); DOL Compliance Poster, *Migrant and Seasonal Agricultural Worker Protection Act (MSPA) English/Spanish Version* (Apr. 1983), available at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.pdf (last visited Jan. 11, 2017). Posters are also required for certain employees working on federal or federally assisted construction projects and federal government contracts. *See* 41 U.S.C. § 351 *et seq.*; 29 C.F.R. § 5.5(a)(1); DOL WHD Compliance Posters, *Employee Rights Under the Davis-Bacon Act for Laborers and Mechanics Employed on Federal or Federally Assisted Construction Projects* (Apr. 2009) and *Employee Rights on Government Contracts* (Apr. 2009), available respectively at http://www.dol.gov/whd/regs/compliance/posters/fedprojc.pdf and http://www.dol.gov/whd/regs/compliance/posters/sca.htm (last visited Jan. 11, 2017).

[727] M.G.L. ch. 151, § 16; 454 C.M.R. § 27.07(1) (this rule does not apply to domestic service employees who work in their employers' homes).

[728] M.G.L. ch. 151, § 1.

[729] Office of Massachusetts Attorney General Compliance Poster, *Massachusetts Wage & Hour Laws* (Dec. 2015), available in English, Spanish, Portuguese, and Chinese at http://www.mass.gov/ago/doing-business-in-massachusetts/labor-laws-and-public-construction/wage-and-hour/wage-and-hour-poster.html (last visited Jan. 11, 2017).

also list several Fair Labor hotlines for wage and hour complaints.[730]

B. Posting Days of Rest and Sunday Work

With a few narrow exceptions, an employer must allow each of its employees to have at least twenty-four consecutive hours of rest per week.[731] If an employer operates its business on a Sunday, it must first post a list of employees who will work that day.[732] The list must specify which alternate day of rest those employees will receive, and it must be on display in a conspicuous location.[733] Employers may not require *or allow* employees to work on those designated days of rest.[734]

C. Posting Work Hours for Minor Employees

Employers of minors must post each minor's weekly schedule in a conspicuous location within the minor's work area.[735] 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.[736] 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.[737]

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[730] *Id*. The federal government also requires employers to post in a conspicuous location a notice of the FLSA's wage and hour provisions. 29 C.F.R. § 516.4. This poster states the federal minimum wage (currently $7.25 per hour) and summarizes the federal laws concerning overtime pay, youth employment, tips, nursing mothers, and the enforcement of these laws. DOL WHD Compliance Poster, *Employee Rights Under the Fair Labor Standards Act* (July 2009), available at http://www.dol.gov/whd/regs/compliance/posters/minwagep.pdf (last visited Jan. 11, 2017). The poster prominently displays a toll free wage and hour complaint hotline, as well as the website address for the DOL's Wage and Hour Enforcement Division.

[731] M.G.L. ch. 149, § 48. While the statute limits itself to manufacturing, mechanical, or mercantile employees, at least one court has construed it broadly to cover all jobs with the exceptions discussed below. *See, e.g.*, *Bujold*, 2007 WL 4415635, at *13 (holding that the law "prohibit[s] everyone from being required to work seven days per week unless the statute expressly allowed a defined group of employees to be denied a weekly day of rest"). There are narrow exceptions to this rule, including establishments used for the manufacture or distribution of gas, electricity, milk, or water; hotels; the transportation of food; and the sale or delivery of food by or in establishments other than restaurants. M.G.L. ch. 149, § 49. *See also* M.G.L. ch. 149, § 50 (janitors; employees whose duties include no work on Sunday other than setting sponges in bakeries; caring for live animals; caring for machinery; employees engaged in the preparation, printing, publication, sale, or delivery of newspapers; farm or personal service employees; and any employee called for service by an emergency (pharmacists employed in drug stores are also not subject to the Sunday work and rest day laws)). See Section I.B-C for a complete discussion of Sunday work and Day of Rest laws.

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

[733] *Id.*

[734] *Id.*

[735] M.G.L. ch. 149, § 74.

[736] *Id.*

[737] *Id.*

D. Posting the Special Minimum Wage Paid to Employees with Disabilities

Both Massachusetts and federal law allow employers to pay a special, lower minimum wage to workers with disabilities.[738] This group includes those whose "productive capacity" is impaired by physical or mental disability, age, or injury.[739] In order to qualify for the special minimum wage, an employer must first obtain a certificate issued by the Massachusetts Commissioner of Health and Human Services.[740] After receiving the Commissioner's permission, the employer must post a notice from the DOL explaining the special minimum wage.[741] The poster—which is also available in Braille and in audio form—must be displayed in an area of the workplace that is readily visible to the disabled employees, their parents or guardians, and other workers.[742] The poster explains that employers must review special wages at least every six months and recalculate them whenever the general minimum wage increases.[743] It also summarizes the laws regarding overtime, youth employment, fringe benefits, and the petitioning process for contesting a special wage.[744] The DOL's wage and hour complaint hotline prominently appears at the bottom of the poster.[745]

X. WAGE ASSIGNMENTS

Wage assignments are contracts that transfer an employee's right to collect his or her future wages to a third party.[746] Typically, employees assign their wages in order to repay debts owed to banks, credit card companies, or other creditors. Massachusetts takes a paternalistic approach to wage assignments, carefully regulating them due to concerns that such assignments could result from improper coercion or could leave employees unable to support themselves and their families.[747]

To be deemed valid in Massachusetts, all wage assignments must be in writing and they must

[738] 29 C.F.R. § 525.1; M.G.L. ch. 151, § 9.

[739] *Disabilities Poster*, *supra* note 321.

[740] M.G.L. ch. 151, § 9.

[741] 29 C.F.R. § 525.14.

[742] *Id.*

[743] *Disabilities Poster*, *supra* note 321.

[744] *Id.*

[745] *Id.*

[746] M.G.L. ch. 154, § 1. Employees may assign wages earned through at-will employment, even though the employment is of unknown duration and the amount of future earnings is uncertain. *See Citizens' Loan Ass'n v. Boston & Maine R.R.*, 196 Mass. 528, 530, 82 N.E. 696 (1907) ("[T]he worker under contract for service, though indefinite as to time and compensation and terminable at will[,] has an actual and real interest in wages to be earned in the future by virtue of his contract.").

[747] *See In re Nance*, 556 F.2d 602, 610 (1st Cir. 1977) (holding that purpose of statute is to "protect a wage earner from assigning away in advance his entire means of supporting himself and his family").

substantially conform to a standard form provided in the statute.[748] The employer must accept the wage assignment in writing, and the employee's spouse must give his or her written consent as well.[749] Employees may not assign their wages to their employer or to any third party if the intent is to relieve the employer of the obligation to pay wages.[750]

The Commonwealth's other requirements for valid wage assignments vary depending on whether the assignment is for more or less than $3,000.[751] For amounts under $3,000, a record of the wage assignment must be recorded by the clerk of the municipality where the employee resides if he or she is a Massachusetts resident, or where the employee is employed if he or she resides out-of-state. The assignment must state that wages of $10.00 per week are exempt. Wage assignments of less than $3,000 are only valid for one year.[752]

Wage assignments that are greater than $3,000 have different and additional requirements.[753] First, a wage assignment can only secure a debt that was incurred prior to or at the same time as the assignment's execution. The written wage assignment must list its date of execution, the amount of money or goods the employee received in return, and any interest rate that applies to the loan. The wage assignment must also state that 75 percent of the employee's weekly earnings are exempt, and the employee must sign it personally (the signature of an attorney acting as the employee's agent will not suffice). Wage assignments of over $3,000 are not valid unless the employee receives a copy of the assignment upon its execution. The employer must also receive a written copy, accompanied by an account listing the balance due, the amount already repaid, and the date of every payment along with an indication of whether the payment will apply to interest, principal, or other loan fees. Wage assignments of over $3,000 are only valid for two years.[754]

If a wage assignment meets the applicable statutory requirements, it will be enforceable even if the employee later declares bankruptcy.[755] Nonetheless, wage assignments cannot interfere with deductions from wages for union dues or health insurance premiums, or drop the employee's pay below minimum wage.[756]

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[748] M.G.L. ch. 154, §§ 2-3, 5; *In re Opinion of Justices*, 267 Mass. 607, 609, 166 N.E. 401 (1929) (noting that wage assignments must be memorialized in writing).

[749] M.G.L. ch. 154, §§ 2-3. The statute by its terms requires the written consent of the employee's *wife*, but it is likely that a court would update this language to require the consent of a spouse of either sex. *See In Re Opinion of Justices*, 267 Mass. at 609 (noting that wage assignments must have written consent of employee's wife).

[750] M.G.L. ch. 149, § 150.

[751] *See* M.G.L. ch. 154, §§ 2-4.

[752] M.G.L. ch. 154, § 2.

[753] M.G.L. ch. 154, §§ 3-4.

[754] *Id.*

[755] *See Citizens' Loan Ass'n*, 196 Mass. at 532 ("The assignment to the plaintiff is a lien which . . . was not affected by the discharge in bankruptcy of the assignor."). *See also Raulines v. Levi*, 232 Mass. 42, 44, 121 N.E. 500 (1919) ("[i]f valid in its inception the assignment remained in force notwithstanding the discharge of the plaintiff in bankruptcy").

[756] *See* M.G.L. ch. 154, § 8; M.G.L. ch. 151, § 1 (setting the Massachusetts minimum wage).

XI. GARNISHMENTS

While wage assignments are voluntary arrangements between employees and third parties, garnishments are involuntary. Wages are typically garnished when a court orders an employer to withhold a portion of an employee's after-tax earnings to repay a debt owed to a third party.[757] Wage garnishments are carefully regulated to avoid abuse by predatory lenders and to ensure that unrestricted garnishments do not encourage employers to terminate employees subject to garnishments because the employees are perceived as untrustworthy.[758] Massachusetts law and the federal garnishment statute, known as the Consumer Credit Protection Act (CCPA), regulate garnishments in different ways.[759] In general, the law permitting the smallest garnishment controls.[760] Because the Massachusetts law governing garnishments is more restrictive in some ways, but federal law is more restrictive in other ways, employers must be aware of both the state and federal requirements. Employers should comply with the more restrictive rule in any given situation. As detailed in Section XI.B, when net wages are garnished pursuant to child or spousal support orders, the employee receives less protection under both state and federal law.

A. Calculating Garnishments Under Massachusetts Law and the CCPA

Under both Massachusetts and federal law, a certain portion of an employee's wages are exempt from garnishment, although the laws differ on how this exempt amount is calculated. Massachusetts exempts from garnishment "the greater of 85 per cent of the [employee's] gross wages or 50 times the greater of the federal or the Massachusetts hourly minimum wage for each week or portion thereof."[761] Based on the Massachusetts and federal minimum wage rates at the time of publication, this means that either the first $500, or if greater, the first 85 percent of the employee's wages, is exempt from garnishment. The CCPA is even more complex. First, its protections apply to everyone receiving "personal earnings."[762] The CCPA defines "personal earnings" as including net wages, salaries, commissions, bonuses, and pensions or other retirement income.[763] The CCPA excludes tips from its definition of earnings; thus, employers

[757] 15 U.S.C. § 1672(c) ("The term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."); DOL Wage & Hour Fact Sheet #30 (July 2009) (wages can also be garnished by IRS or state tax collection agency levies for unpaid taxes and by federal agencies for non-tax debts owed to federal government).

[758] 15 U.S.C. § 1671(a)(1)-(2).

[759] 15 U.S.C. § 1671 *et seq.*; M.G.L. ch. 246, § 28.

[760] 15 U.S.C. § 1677(1).

[761] M.G.L. ch. 246, § 28.

[762] 15 U.S.C. § 1672(a); DOL Wage & Hour Fact Sheet #30 (July 2009). Certain types of garnishments are exempt from both state and federal regulations, such that the employee does not receive any of the protections described above. The CCPA does not limit the amount of earnings subject to garnishment for state or federal taxes, for non-tax debts owed to the federal government, or in certain types of bankruptcy proceedings. *See also* 15 U.S.C. § 1673(b)(1) (for non-tax debts owed to federal agencies, up to 10 percent of disposable earnings may be garnished under the Higher Education Act, and if the agency acts under the Debt Collection Act, up to 15 percent of disposable earnings may be garnished).

[763] DOL Wage & Hour Fact Sheet #30 (July 2009).

cannot garnish tips under federal law.[764] Next, the CCPA limits the earnings vulnerable to garnishment to those deemed "disposable earnings," which are those wages left over after deducting mandatory withholdings.[765] Employers should only exclude withholdings *required by law* from the "disposable" amount subject to garnishment.[766] For instance, union dues, health insurance, and retirement plan contributions are not excluded from the employee's disposable income.[767]

After ascertaining the amount of an employee's disposable earnings, the CCPA requires employers to calculate the maximum allowable garnishment for that income using two different formulas.[768] The garnishment is limited to the smaller of either 25 percent of the week's disposable earnings, or the amount of weekly pay that exceeds thirty times the federal minimum wage.[769]

To determine the permissible garnishment amount, Massachusetts employers must calculate all possible garnishment limits under state and federal law. The smallest amount produced by the different formulas is the maximum wage that may be garnished.[770] The following table provides an example of garnishment calculations for a Massachusetts employee earning $14.00 per hour, using the current federal minimum wage of $7.25 per hour in the CCPA formulas.[771]

[764] *Id.*

[765] *Id.*; 15 U.S.C. § 1672(b).

[766] DOL Wage & Hour Fact Sheet #30 (July 2009).

[767] *Id.*

[768] 15 U.S.C. § 1673(a).

[769] *Id.*

[770] *Id.*

[771] *See* DOL Employment Law Guide, *Wages and Hours Worked: Minimum Wage and Overtime Pay* (Sept. 2009), available at http://www.dol.gov/compliance/guide/minwage.htm (last visited Jan. 11, 2017).

Calculating the Maximum Garnishment for a Massachusetts Employee Earning $14.00 per Hour with a Massachusetts Minimum Wage of $11.00 and a Federal Minimum Wage of $7.25 per Hour
• Step 1: Calculate disposable earnings (those wages left over after mandatory withholdings). We assume weekly earnings of $560.00 ($14.00 per hour x 40 hours worked) and disposable earnings of $350.00 per week. • Step 2: Massachusetts calculation #1. Total weekly earnings of $560.00 - (50 x $11.00 minimum wage, which exceeds $7.25 federal minimum wage) = $10.00 maximum weekly garnishment. • Step 3: Massachusetts calculation #2. 15% of $560 in total weekly earnings = $84.00 maximum weekly garnishment. • Step 4: CCPA calculation #1. 25% of $350.00 in disposable earnings = $87.50 maximum weekly garnishment. • Step 4: CCPA calculation #2. $350.00 - $217.50 (30 x $7.25 minimum wage) = $132.50 maximum weekly garnishment. • Step 5: Use the lowest garnishment amount of $10 per week.

B. Garnishments for Support Orders

When net wages are garnished pursuant to child or spousal support orders, the employee receives less protection under both Massachusetts and federal law. Under Massachusetts law, the statutory $125.00 exemption does not apply to support orders.[772] Likewise, the CCPA allows larger garnishments for support orders—up to 50 percent of a week's disposable earnings if the employee supports a spouse or child other than the one indicated in the support order (e.g., he or she remarried or has other children), and 60 percent if the employee has no additional dependents.[773] If the support payments are more than twelve weeks in arrears, these limits increase to 55 percent and 65 percent, respectively.[774]

Support orders take priority over all other types of wage assignments and attachments,[775] except IRS tax levies, which have equal status.[776] Massachusetts law permits an employer to deduct a

[772] M.G.L. ch. 246, § 28.

[773] 15 U.S.C. § 1673(b)(2).

[774] *Id.*

[775] M.G.L. ch. 119A, § 12(f)(4) ("This order shall have priority over all other orders of assignment, income withholding, attachment, liens, executions and other legal process, from whatever source, notwithstanding any other provision of law.").

[776] Comptroller of the Commonwealth, Payroll and Labor Cost Management Policies, Type of Employment, *Wage Garnishments*, at 2 (revised Nov. 1, 2006), available at http://www.mass.gov/osc/publications-and-reports/policies/payroll-and-labor-cost-

support order processing fee of $1.00 per pay period from the employee's pay, and the employer may also consolidate all of its employees' support order garnishments into a single check submitted to the state each pay period.[777] An employer that fails to garnish wages subject to a support order may face stiff penalties and must compensate the beneficiary of the support order from its own funds for the full amount the employer failed to remit. Courts must also impose punitive damages equal to the amount of the support order or $500.00, whichever is larger.[778]

C. Additional Protections for Members of the Military

Federal law offers specific protections to members of the military whose wages are subject to garnishment if their military service prevented them from complying with a court order.[779] These servicemen and women may ask a judge to vacate or stay a garnishment order if the proceeding began before or during their military service, or within ninety days of its completion.[780] This rule also applies to child and spousal support orders.[781]

D. Terminating Employees Subject to Garnishments

An employer may not terminate any employee because he or she is subject to a single garnishment.[782] The CCPA punishes such terminations with a $1,000 fine and up to one year in prison, and a court may also order that the employee be reinstated.[783] However, an employee may be lawfully terminated if he or she is subject to multiple garnishments unless the garnishments are support orders.[784] In Massachusetts, employers that refuse to hire or that terminate, suspend, or discipline employees because they are subject to support orders can be liable for lost wages and benefits, plus an additional $1,000 fine.[785]

management-lcm.html (last visited Jan. 11, 2017) (stating that whichever submission the state Department of Revenue receives first will be processed first).

[777] M.G.L. ch. 119A, § 12(f)(1).

[778] M.G.L. ch. 119A, § 12(f)(3)(A).

[779] Servicemembers Civil Relief Act of 2003 (SCRA), 50 U.S.C. § 24, App. 524.

[780] *Id.*

[781] *See* U.S. Department of Health and Human Services (DOH), Office of Child Support Enforcement, Dear Colleague Letter DCL-04-26 (June 18, 2004) ("The SCRA applies to child support enforcement case[s] that are not final before December 19, 2003, the date of enactment of this Act.").

[782] 15 U.S.C. § 1674(a).

[783] 15 U.S.C. § 1674(b).

[784] 15 U.S.C. §§ 1674(a), 1677(2); M.G.L. ch. 119A, § 12(f)(2).

[785] M.G.L. ch. 119A, § 12(f)(2).

XII. CLASSIFYING WORKERS AS INDEPENDENT CONTRACTORS

One of the most challenging workplace issues facing Massachusetts businesses is the correct classification of certain workers as independent contractors rather than employees. In the past, the definition of an independent contractor was more flexible, and many companies retained independent contractors for a variety of reasons: to supplement their work force, to provide unique or specialized skills, to complete a defined task or project, or to augment their staffing levels for a short term. The definition of an independent contractor has become stricter, and Massachusetts and federal law specifically regulate and limit the circumstances under which a worker may legally be classified as an independent contractor.[786]

The Massachusetts Independent Contractor Statute is one of the most restrictive in the country, sharply limiting those employees who may legitimately be classified as independent contractors.[787] Further, the Massachusetts Attorney General has made prosecuting employers that misuse the independent contractor designation a high priority.[788]

As discussed in Sections XVII and XVIII, the Office of Massachusetts Attorney General enforces the wage and hour laws of Massachusetts. The office investigates employee misclassification complaints and may issue fines for violations.[789] The Attorney General's advisory on the Independent Contractor Statute (148B Advisory) warns companies of the risks of civil and criminal charges if they are targeted for an investigation of their independent contractor classifications, including insurance fraud, violation of minimum wage and overtime laws, and failure to keep full and accurate payroll records.[790]

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[786] *See* M.G.L. ch. 149, § 148B(a)(1). Depending on the issue at hand, the law determining whether an individual may be classified as an independent contractor varies. The number of different tests for independent contractor status is evidence of the complexity of this area of law. For purposes of minimum wage, overtime pay, timely payment of wages, and personnel recordkeeping, the more restrictive Massachusetts Independent Contractor Statute applies, as discussed in this chapter. M.G.L. ch. 149, § 148B(a)(1). For purposes of the Massachusetts Unemployment Insurance Statute, a similar but less restrictive standard applies. M.G.L. ch. 151A, § 2. The Massachusetts Department of Revenue uses the IRS twenty-factor test to decide whether workers are independent contractors for state wage withholding purposes. *Effect of New Employee Classification Requirements Under M.G.L. ch. 149, § 148B on Withholding of Tax on Wages Under M.G.L. ch. 62B*, Department of Revenue TIR 05-11 (2005). The DOL looks to the "economic reality test" in enforcing the FLSA. *See* Administrator's Interpretation, No. 2015-1 (Dep't of Labor July 15, 2015). The economic reality test has approximately six factors but focuses somewhat heavily on whether the worker is economically dependent on the company or in business for him or herself, along with the degree of control that the company has over the worker. *See id*. Although the conclusions under the various tests may be similar, separate analysis is required to avoid violations.

[787] *See* M.G.L. ch. 149, § 148B(a)(1).

[788] *See generally* Massachusetts Attorney General Advisory 2008/1.

[789] Penalties for violations of Massachusetts wage and hour laws are discussed further in Section XVIII.

[790] Massachusetts Attorney General Advisory 2008/1, at 1, 4. The Attorney General most closely scrutinizes situations in which the following factors are present:

- Individuals are providing services for an employer that are not reflected on the employer's business records

While a company may challenge the Attorney General's position in court and the Attorney General's opinions do not have the force of law, litigating these cases is expensive and the Attorney General's opinion is entitled to some deference.[791] Companies doing business in Massachusetts are well advised to undertake a careful legal analysis before classifying any worker as an independent contractor.[792]

A. The Massachusetts ABC Test for Independent Contractors

The test for independent contractor status under the Massachusetts Independent Contractor Statute, commonly referred to as the "ABC test," has three prongs, and the company has the burden of proving that all three are met.[793] To overcome the presumption that a worker is an employee, the party receiving services must establish that:

- The worker is free from its control and direction in performing the service, both under the contract and in fact
- The service provided by the worker is outside the employer's usual course of business
- The worker is customarily engaged in an independent trade, occupation, profession, or business of the same nature as that involved in the service performed[794]

- Individuals are providing services who are paid "off the books," "under the table," in cash, or provided no documents reflecting payment
- Insufficient or no workers' compensation coverage exists
- Individuals are providing services who are not provided 1099s or W-2s by any entity
- The contracting entity provides equipment, tools, and supplies to individuals or requires the purchase of such materials directly from the contracting entity
- Alleged independent contractors do not pay income taxes or employer contributions to the Division of Unemployment Assistance

Massachusetts Attorney General Advisory 2008/1, at 5-6.

[791] *Smith v. Winter Place LLC*, 447 Mass. 363, 851 N.E.2d 417 (2006) (Attorney General's interpretations of the wage and hour statutes are entitled to substantial deference so long as they are not inconsistent with the plain language of the statutes, but they do not have the force of law). As noted above, the Department of Revenue has not adopted the test set forth in Section 148B.

[792] Until recently, there was little case law interpreting the Independent Contractor Statute. In recent years, however, plaintiffs' attorneys have filed large numbers of cases under the statute, creating the opportunity for courts to clarify the scope of the law.

[793] *Sebago v. Boston Cab Dispatch, Inc.*, 471 Mass. 321, 327, 28 N.E. 3d 1139 (2015); *Scalli v. Citizens Fin. Group, Inc.*, 2006 WL 1581625, at *14 (D. Mass. Feb. 28, 2006) (citing *Silva v. Dir. of Div. Emp't Sec.*, 398 Mass. 609, 611, 499 N.E.2d 1205 (1986)); *see also Athol Daily News v. Bd. of Review of Div. of Emp't & Training*, 439 Mass. 171, 175, 786 N.E.2d 365 (2003) (finding that employer bears burden of establishing all three prongs of ABC test for purposes of Massachusetts Unemployment Insurance Statute, M.G.L. ch. 151A, § 2, which applies a similar but not identical ABC test). In determining whether an employee is an independent contractor, the Independent Contractor Statute explicitly excludes certain factors from consideration, including an employer's failure to withhold federal or state taxes, to pay unemployment contributions, or to purchase workers' compensation coverage. M.G.L. ch. 149, § 148B(b). Likewise, whether or not individuals purchased workers' compensation coverage for themselves is irrelevant. M.G.L. ch. 149, § 148B(c).

[794] M.G.L. ch. 149, § 148B.

Failing to establish even one prong may be fatal to independent contractor status. Each prong is discussed in detail below.

1. Level of Control Exercised by Employer

The first prong of the ABC test scrutinizes the level of control that a company exercises over an individual, with higher levels of control making it more likely that the individual is an employee. Specifically, in order to meet the requirements of the first prong, the company must show that the individual is "free from control and direction in connection with the performance of the service, both under his [or her] contract for the performance of the service and in fact."[795]

The initial inquiry examines the contract for services to identify whether the worker was classified as an independent contractor and whether the terms of the contract indicate who would control the individual's work. At a minimum, a business seeking to classify a worker as an independent contractor should implement an independent contractor agreement and describe the worker as such, although the courts and the Attorney General will go beyond mere labels to scrutinize the actual relationship between the parties. A contract that refers to the individual as an employee may damage the company's case, but conversely a contract that clearly labels someone as an independent contractor is insufficient by itself to establish independent contractor status.[796] Businesses should also carefully consider the ramifications of including Massachusetts choice of law and forum selection clauses in independent contractor agreements and other contracts with non-employee workers. The Independent Contractor Statute does contain an explicit geographic restriction on its application, and the SJC has held that workers who reside and perform work exclusively in another state can challenge their independent contractor status under the Massachusetts statute if they are parties to an agreement with Massachusetts provisions.[797]

The Independent Contractor Statute also requires freedom from the company's control *in fact*, and not merely in the terms of the contract. To be free from control "a worker's activities and duties should actually be carried out with minimal instruction."[798] These determinations are highly fact-specific. In examining the level of control exerted over an individual, courts have considered a number of factors, such as whether the individual wore a company uniform, had uniforms available to him or her even if wearing one was not required, drove a company vehicle, used company-provided supplies, was subject to performance reviews or discipline, or set his or her

[795] M.G.L. ch. 149, § 148B(a)(1).

[796] *See Scalli v. Citizens Fin. Grp.*, 2006 WL 1581625, at *14 (D. Mass. Feb. 28, 2006) (finding that contract which referred to individuals as "employees" weighed against argument that they were independent contractors).

[797] *Taylor v. Eastern Connection Operating, Inc.*, 465 Mass. 191, 198-200 (2013) (overturning dismissal by trial court, which had held that the Massachusetts Independent Contractor Statute does not apply to non-Massachusetts residents working outside of Massachusetts). The Court also held in *Taylor* that if plaintiffs were ultimately successful on their claims that they were employees under the Independent Contractor Statute, they could also pursue their payment of wages and overtime claims, since those claims were predicated on the assertion that they were employees. *Id.* at 200.

[798] Massachusetts Attorney General Advisory 2008/1, at 3.

own work schedule.[799] While courts construe the control requirement strictly, many also note that the test is not so narrow as to require workers to be *entirely* "free from direction and control from outside sources."[800] The Attorney General recognizes that even bona fide independent contractors typically work under some level of supervision, but businesses should be prepared to show that supervision was minimal.[801]

In 2015, the SJC held that taxi cab medallion owners and radio associations met their burden of proof under the ABC test's first prong—control exercised by the employer—by establishing that taxi cab drivers were sufficiently free from the control required under the statute.[802] In reaching that conclusion, the SJC observed that the drivers: (1) chose the shifts that they worked; (2) were free to transport as many or as few passengers as they wished; (3) were "free to operate" their own businesses transporting customers for fares; (4) could contract with other medallion owners and utilize different radio associations; (5) were free to accept or decline dispatches; and (6) signed lease agreements that demonstrated freedom from direction and control.[803] Although the drivers were subject to certain restrictions regarding their "appearance, cellular telephone usage, ability to smoke, . . . treatment of passengers, meter rates, and geographic areas of operation," those indications of control were not imposed by the defendants, but rather by regulations governing the entire Boston taxi cab industry promulgated by the Boston Police Commissioner pursuant to authority delegated by the Massachusetts legislature.[804]

2. Services Provided Are Outside the Usual Course of Business

The second prong of the ABC test, which is arguably the hardest to satisfy, requires that the individual's services be performed outside the "usual course of business of the employer."[805]

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[799] *Coll. News Serv. v. Dep't of Indus. Accidents*, 21 Mass. L. Rptr. 464, 2006 WL 2830971, at *5-6 (Mass. Super. Ct. Sept. 14, 2006) (listing functions). *See also Am. Zurich Ins. Co. v. Dep't of Indus. Accidents*, 21 Mass. L. Rptr. 224, 2006 WL 2205085, at *3 (Mass. Super. Ct. June 1, 2006) ("[F]actors used to determine whether the employer controlled and directed the workers' performance include such things as: (1) whether the worker is paid by the job or by the hour; (2) whether the employer provides tools, equipment, or materials on the job; and (3) whether the relationship can be terminated without any liability on the part of the employer."); *Rainbow Dev., LLC v. Commonwealth, Dep't of Indus. Accidents*, 20 Mass. L. Rptr. 277, 2005 WL 3543770, at *3 (Mass. Super. Ct. Nov. 19, 2005) (defendant monitored individuals' job performance, required them to drive company vehicles, and made company shirts available); *Amero v. Townsend Oil Co.*, No. ESCV2007-1080-C (Mass. Super. Ct. Dec. 3, 2008) (Murtagh, J.) (holding that first prong of ABC test was not satisfied when employer required delivery truck driver to sign covenant not to compete, paint company's logo on his truck, and wear a uniform, and where employer controlled driver's customer list and set prices); *Driscoll v. Worcester Telegram & Gazette*, 72 Mass. App. Ct. 709, 714, 893 N.E.2d 1239 (2008) (holding that first prong of ABC test was not satisfied when a newspaper "controlled virtually all aspects" of service provided by its carriers, including selecting their customers; setting order of their deliveries and prices charged; reserving right to demand additional services from carriers; and directly supervising their work on daily basis). While these cases arose under the Unemployment Statute, the first prong of the ABC test is identical under the Massachusetts Unemployment Insurance and Independent Contractor Statutes.

[800] *Athol*, 439 Mass. at 178 (interpreting the Unemployment Insurance Statute, M.G.L. ch. 151A, § 2).

[801] Massachusetts Attorney General Advisory 2008/1, at 2.

[802] *Sebago*, 471 Mass. at 332-33.

[803] *Id.*

[804] *Id.* at 322, 333.

[805] M.G.L. ch. 149, § 148B(a)(2).

Unfortunately, the Independent Contractor Statute does not define "usual course of business," making a determination under this second prong as fact-specific as the first.[806] A business cannot meet this requirement simply by showing that the individual did his or her work at an outside location.[807] Rather, under the revised Independent Contractor Statute, the inquiry under the second prong focuses on the nature of the work at issue.

The SJC has said that "a purported employer's own definition of its business is indicative of the usual course of business."[808] Also, relying on the Attorney General's 148B Advisory, the SJC noted that another factor in determining the "usual course of business" is "whether the service the individual is performing is necessary to the business of the employing unit or merely incidental."[809] Using this "necessary" versus "incidental" framework, the 148B Advisory lists two examples of relationships that, according to the Attorney General, would not satisfy the "usual course of business" prong under the Independent Contractor Statute: (1) a drywall company that classifies drywall installers as independent contractors; and (2) a motor vehicle appraisal company that classifies appraisers as independent contractors.[810] In each example, the 148B Advisory notes that the individual performing the work is performing an "essential part" of the company's business, and therefore, the company cannot satisfy the "usual course of business" prong.[811] On the other hand, the 148B Advisory reflects that an individual moving furniture for an accounting firm would be acceptable under the "usual course of business" prong "because the moving of furniture is incidental and not necessary to the accounting firm's business."[812]

In *Sebago*, discussed above, the SJC also concluded that taxi cab drivers (in the business of transporting customers for fares) performed their services outside the "usual course of business" of taxi cab medallion owners (in the business of leasing taxis) and radio associations (in the business of providing dispatch services).[813] The Court observed that the medallion owners' and radio associations' businesses were "not directly dependent on" the drivers' services.[814] Accordingly, the companies at issue satisfied the second prong.

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[806] *See id.*

[807] This distinguishes the Independent Contractor Statute from the standard applicable under the Unemployment Insurance Statute. Under the Unemployment Insurance Statute, a company can satisfy the second prong by demonstrating that the worker performed his or her services either outside the company's "usual course of business" or outside the company's "places of business." M.G.L. ch. 151A, § 2(b).

[808] *Sebago*, 471 Mass. at 333 (citing *Athol*, 439 Mass. at 179).

[809] *Id.* (quoting Massachusetts Attorney General Advisory 2008/1, at 6); *see also Rosenthal v. Romano Group, Inc.*, 89 Mass. App. Ct. 1132 (2016) ("We focus our analysis on the realities of [the company's] actual business operations, . . . and not just the employer's description of the business.") (internal quotations and citations excluded).

[810] Massachusetts Attorney General Advisory 2008/1, at 6.

[811] *Id.*

[812] *Id.*

[813] *Sebego*, 471 Mass. at 333-36.

[814] *Id.* at 334, 335.

There are a limited number of opinions interpreting the meaning of "usual course of business" under the second prong of the Independent Contractor Statute, but existing decisions reflect the complex and fact-intensive nature of the issue. For example, a court held under the facts of one case that the services of delivery drivers were within the "usual course of business" of a delivery company.[815] In reaching that conclusion, the court gave deference to the Attorney General's interpretation of "usual course of business" in the 148B Advisory and also focused on the manner in which the company held itself out to the public.[816] By contrast, in another case decided in the District of Massachusetts, the court held that an insurance agent who sold insurance products performed services outside the "usual course of business" of an insurance company with a primary business function of structuring and drafting insurance products.[817] The court drew a distinction between the creation or "manufacture" of insurance products and the sale of those products, concluding that although sales are a critical function to any manufacturing business, that does not make sales the usual course of a manufacturer's business under the Independent Contractor Statute.[818] Even within particular industries there have been mixed decisions regarding the "usual course of business" prong.[819]

Because Massachusetts courts have interpreted the "usual course of business" prong of the Independent Contractor Statute in only a limited number of cases, employers may look to other bodies of law assessing the application of the second prong of the ABC test.[820] In a case interpreting the Massachusetts Unemployment Statute, which uses the same "usual course of business" phrase, the SJC held that the services of news carriers were not outside the usual course of a newspaper publisher's business because distributing a daily newspaper occurred in the usual course of the employer's business—and that encompassed its news carriers' task of delivering papers along their routes.[821] Similarly, when an auto detailing business hired individuals to perform detailing and reconditioning work, those individuals were deemed employees because "without the services of the workers, [the employer] would cease to operate."[822] By contrast, a

[815] *Martins v. 3PD, Inc.*, 2013 U.S. Dist. LEXIS 45753, at *40-48 (D. Mass. Mar. 28, 2013).

[816] *Id.* at 40-43 (holding that the company hired deliver drivers "for a vital and necessary aspect of the business" and "held itself out as a deliver company" through its advertising and marketing materials, such as its website).

[817] *Ruggierro v. Am. United Life Ins. Co.*, 137 F. Supp. 3d 104, 118 (D. Mass. 2015) (stating "I agree with the defendants that providing information about and fashioning a product one manufactures is not the same as being in the business of directly selling it.").

[818] *Id.* at 119.

[819] Compare *Depianti v. Jan-Pro Franchising Int'l, Inc.*, 39 F. Supp. 3d 112, 127-29 (D. Mass. 2014) (finding that a company satisfied the second prong where its "usual business was establishing a trademark and cleaning system that was then licensed to regional franchisees" who, in turn, sold and provided the actual cleaning services.") with *Awuah v. Coverall N. Am., Inc.*, 707 F. Supp. 2d 80, 82-84 (D. Mass. 2010) (*Awuah* I) (finding that a company failed to satisfy the second prong where it was in the business of selling cleaning services, just like the workers at issue, and not in the business of selling franchises).

[820] *Awuah* I, 707 F. Supp. 2d at 82-84.

[821] *Athol*, 439 Mass. at 179 (interpreting the Unemployment Statute, M.G.L. ch. 151A, § 2). *See also Coll. News Serv.*, 2006 WL 2830971, at *6 (finding that services provided by newspaper carriers were not outside the usual course of business in the context of a workers' compensation claim because College News Service's entire business is distribution—delivering newspapers obviously is in the usual course of its business).

[822] *Rainbow Dev.*, 2005 WL 3543770, at *3 (analyzing the ABC test for purposes of a workers' compensation claim).

general contractor properly classified workers as independent contractors when he hired them to perform construction work that he did not know how to do and that he did not perform as part of his own regular business.[823]

Notably, the SJC and the First Circuit have held that the Federal Aviation Administration Authorization Act (FAAAA) may preempt the "usual course of business" prong of the Independent Contractor Statute when it comes to motor carriers in the business of transporting property.[824] The FAAAA contains a preemption provision, which provides that "all state laws that 'relate[] to a price, route, or service of any motor carrier . . . with respect to the transportation of property' are preempted."[825] In their analyses, the SJC and the First Circuit observed that Congress designed the FAAAA to deregulate the transportation of property in the trucking industry to facilitate the free flow of property at competitive rates.[826] Given the FAAAA's language and objectives, "a state statute is preempted [by the FAAAA] if it expressly references, or has a significant impact on, carriers' prices, routes, or services."[827] A significant impact "may be proven by empirical evidence or the logical effect that a particular scheme has on the delivery of services."[828] Applying these principles to the cases before them, the SJC and the First Circuit concluded that the FAAAA preempts the "usual course of business" prong, reasoning that application of that prong would have a significant impact on the prices, routes, or services of the motor carriers at issue.[829]

Although the First Circuit referred to the "usual course of business" prong as "'something of an anomaly' among state wage laws," the court did not conclude that the prong is preempted by the FAAAA in all cases involving motor carriers. Rather, the First Circuit held that the second prong was preempted as the plaintiffs proposed to apply it in the particular cases before the court.[830]

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[823] *Am. Zurich Ins.*, 2006 WL 2205085, at *5 (applying the ABC test for purposes of workers' compensation claim).

[824] *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95, 102 (2016); *Massachusetts Delivery Assn. v. Healey*, 821 F.3d 187, 192 (1st Cir. 2016); *see also Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429, 440 (1st Cir. 2016).

[825] *Schwann*, 813 F.3d at 435 (quoting 49 U.S.C. § 14501(c)(1)); *see also Chambers*, 476 Mass. at 101.

[826] *Schwann*, 813 F.3d at 436 (citations omitted); *see also Chambers*, 476 Mass. at 101 (citations omitted).

[827] *Schwann*, 813 F.3d at 435 (citing *Massachusetts Delivery Ass'n v. Coakley*, 769 F.3d 11, 17-18 (1st Cir. 2014)); *see also Chambers*, 476 Mass. at 101.

[828] *Massachusetts Delivery Assn.*, 821 F.3d at 191 (internal quotations omitted); *see also Chambers*, 476 Mass. at 101 (noting that requiring motor carriers to have employee delivery drivers "likely also would have a significant, if indirect, impact on motor carriers' services by raising the costs of providing those services" and referencing the cost of minimum wage as an example) (citations omitted).

[829] *Chambers*, 476 Mass. at 102 (holding that usual course of business prong's "de facto ban [on use of independent contractors] constitutes an impermissible 'significant impact' on motor carriers that would undercut Congress's objectives in passing the FAAAA; the statute containing prong two also forms part of an impermissible 'patchwork' of State laws due to its uniqueness."); *Massachusetts Delivery Ass'n*, 821 F.3d at 192 (holding that application of the usual course of business prong "would logically have a significant effect on [the company's] routes and services."); *Schwann*, 813 F.3d at 438 (holding that application of the "usual course of business" prong would "pose[] a serious potential impediment to the achievements of the FAAAA's objectives because a court, rather than the market participant, would ultimately determine what services that company provides and how it chooses to provide them").

[830] *Massachusetts Delivery Assn.*, 821 F.3d at 192-93; *Schwann*, 813 F.3d at 437-40.

3. Independent Trade, Occupation, Profession, or Business

The third prong of the ABC test requires a business to demonstrate that the individual is "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the services performed."[831] This prong focuses on whether the individual could provide the service to anyone willing to engage his or her services (which suggests independent contractor status) or whether the nature of the work requires him or her to depend on a single employer (which suggests employee status).[832] While the statute requires that there be the potential for an independent business, it is not necessary that the individual actually run his or her own enterprise.[833] For instance, the SJC ruled in *Sebago* that taxi cab drivers are independent contractors when they were free to (1) lease taxi cabs from different medallion owners that used different dispatch services, (2) accept or reject dispatches, and (3) "advertise their services through personalized business cards."[834] Likewise, news carriers were found to be independent contractors when they were free to deliver papers from other publishers along their routes and to advertise their delivery services to others.[835] Similarly, construction subcontractors met this requirement when they were free to work for competing general contractors if they so desired.[836]

B. Real Estate Brokers Are Exempt from the ABC Test

In a 2015 decision, the SJC held that the Independent Contractor Statute does not apply to real estate brokerage companies and the salespersons with whom they affiliate.[837] The plaintiffs in that case, licensed real estate agents, alleged that the defendants, licensed real estate brokers, misclassified them under the Independent Contractor Statute, thus depriving them of wages under Massachusetts law.[838] The SJC observed that the real estate statute, M.G.L. ch. 112, § 87PP, *et seq*., expressly allows real estate salespersons to be affiliated with brokers as independent contractors.[839] On the other hand, the Independent Contractor Statute "makes it impossible for a

[831] M.G.L. ch. 149, § 148B(a)(3).

[832] *Sebago*, 471 Mass. at 336 (quoting *Athol*, 439 Mass. at 180-81).

[833] *Sebago*, 471 Mass. at 336; *Athol*, 439 Mass. at 180.

[834] *Sebago*, 471 Mass. at 336-37.

[835] *Athol*, 439 Mass. at 181-82 (interpreting the Unemployment Statute, M.G.L. ch. 151A, § 2). *See also Coll. News Serv.*, 2006 WL 2830971, at *6 (finding that newspaper carriers were independent contractors because they could choose to work for competing publishers).

[836] *Am. Zurich Ins.*, 2006 WL 2205085, at *5; *but see Rainbow Dev.*, 2005 WL 3543770, at *3 (finding that workers did not qualify as independent contractors under third prong of ABC test where they were not "carrying on their own business," as evidenced by fact that they did not carry general liability insurance and were not bonded) (internal quotations and citation omitted). One court, however, held that a delivery truck driver who formed his own corporation was still an employee because the first prong of the ABC test was not satisfied, and the employee's business was a "mere shell corporation" established to limit his liability and afford him tax savings. *Amero*, No. ESCV2007-1080-C (Mass. Super. Ct. Dec. 3, 2008).

[837] *Monell v. Boston Pads, LLC*, 471 Mass. 566, 577-78, 31 N.E. 3d 60 (2015).

[838] *Id*. at 568 n.10.

[839] *Id*. at 576.

real estate salesperson to satisfy the three factors required to achieve independent contractor status" given the specific requirements under the real estate statute.[840] The Court observed, for example, that the real estate statute prohibits a salesperson from operating his or her own real estate business or acting as anything other than a representative of a single broker, making it impossible to satisfy the second and third prongs.[841] Regarding the first prong, the Court observed that the real estate statute requires brokers to supervise salespersons, to a certain extent, in order to ensure compliance with an array of statutory and regulatory provisions.[842] The SJC held that the real estate statute controls to the exclusion of the Independent Contractor Statute.[843] In reaching that decision, the SJC relied on the cannon of statutory construction providing that a specific statute controls over the provisions of a general statute.[844] Here, the real estate statute provides a specific and comprehensive regime governing the real estate industry in Massachusetts, while the Independent Contractor Statute applies generally across all industries.

Of note, however, the SJC did not rule that all real estate salespersons in Massachusetts are or can be classified properly as independent contractors.[845] The ruling provides no standard or guidance on what a real estate broker and salesperson need to do, or refrain from doing, to establish an independent contractor relationship given the real estate statute's requirements.

C. Liability for Misclassification as an Independent Contractor

An employee misclassified as an independent contractor has a private right of action against his or her "employer." To recover damages, the 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.[846] Those laws are:

- The wage and hour laws set forth in M.G.L. ch. 149
- The minimum wage law set forth in M.G.L. ch. 151 and 455 C.M.R. § 2.01
- The overtime law set forth in M.G.L. ch. 151
- The law requiring employers to provide health insurance to migrant farm workers, as set forth in M.G.L. ch. 151, § 2B

[840] *Id.* at 575.

[841] *Id.*

[842] *Monell*, 471 Mass. at 577.

[843] *Id.*

[844] *Id.*

[845] *Id.* at 578.

[846] M.G.L. ch. 149, § 148B(d).

- The law requiring employers to keep true and accurate employee payroll records, and to furnish the records to the Attorney General upon request, as set forth in M.G.L. ch. 151, § 15

- The provisions requiring employers to withhold taxes on employee wages, as set forth in M.G.L. ch. 62B

- The workers' compensation provisions punishing knowing misclassification of an employee, as set forth in M.G.L. ch. 152, § 14[847]

Even if an employer misclassifies an employee as an independent contractor, the employer is not liable for damages under the Independent Contractor Statute, so long as in doing so it does not violate any of the above wage and hour laws.[848] In practice, it is unlikely that an employer misclassifying an individual would comply with all of the wage and hour provisions set forth above. The SJC has defined "damages incurred" under the statute as an amount equal to the full value of wages and benefits that the wrongly classified individual would have received as an employee.[849]

If an individual prevails in a suit for a violation of the Independent Contractor Statute and demonstrates a violation of the wage and hour laws as a result of the misclassification, he or she generally is entitled to recover treble damages, as well as litigation costs and reasonable attorneys' fees. In a misclassification case that does not involve a failure to pay wages, an employer is liable only for fees it was required by law to bear, such as liability insurance and workers' compensation insurance or potentially certain expenses incurred by the contractor in the course of his or her work for the employer.[850] This is true even if the misclassified employee agreed to pay those fees and still received at least minimum wage.[851] The SJC has also held that franchise fees paid by

[847] Massachusetts Attorney General Advisory 2008/1, at 4.

[848] *But see Awuah* I, 707 F. Supp. 2d at 85 (granting employee's motion for partial summary judgment on independent contractor misclassification claim and reserving damages issue for later proceedings).

[849] *Somers v. Converged Access, Inc.*, 454 Mass. 582, 584, 911 N.E.2d 739 (2009) (*Somers* II). In *Somers* II, the SJC held that the plaintiff may sue for nonpayment of wages based on misclassification as an independent contractor—even though he earned more as an independent contractor than he would have earned as an employee—because he was not paid the "full value" of wages and benefits that he would have received as an employee. *Id*.

[850] *Awuah v. Coverall N. Am., Inc.*, 460 Mass. 484, 494-97, 952 N.E.2d 890 (2011) (*Awuah* III) (holding that employers violate the Wage Act by deducting the costs of workers' compensation and other mandatory insurance coverage from misclassified employees' pay). Chargebacks deducted when customers paid their bills late were also recoverable as damages because this practice violated the timely payment of wages law, M.G.L. ch 149, § 148. *Id.* at 491-93 (holding that employee "earns" his wages at the time he performs work and must be paid within seven days of that date). While the employer repaid these chargebacks prior to litigation, the employee was still entitled to interest accrued prior to the repayment. *Awuah v. Coverall N. Am., Inc.*, 740 F. Supp. 2d 240, 245 (D. Mass. 2010) (*Awuah* II).

[851] *Awuah* III, 460 Mass. at 494-97.

individuals misclassified as independent contractors are recoverable as damages because such fees require employees to "purchase their jobs" from employers and therefore violate public policy.[852]

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. The specific fine amounts are set forth in Sections XVIII.B-C.

XIII. OTHER MISCELLANEOUS MASSACHUSETTS LAWS

A. Massachusetts Personnel Records Law

The Massachusetts Personnel Records Law[853] 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." "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."[854] The statute specifies that the following information be included in the personnel record: name, address, date of birth, job title and description, rate of pay, compensation paid to the employee, starting date of employment, job application of the employee, résumés or other forms of employment inquiry submitted by the employee to the employer in response to its advertisement, performance evaluations, written warnings of substandard performance, lists of probationary periods, any waivers signed by the employee, copies of dated termination notices, and any other documents relating to disciplinary action regarding the employee.[855]

In 2010, the law was amended to impose an affirmative duty upon an employer 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."[856] The statute provides little guidance as to what information meets these requirements and, as such, creates ambiguity.[857] Nor have the

[852] *Id.* at 497-99. Other fees, such as royalty fees, management fees, and supply and equipment charges, may not be recoverable as damages because no statute precludes employers from shifting such costs to employees. *Awuah* II, 740 F. Supp. 2d at 243-45 (holding that the "parties were free to agree that [employee] would bear these costs").

[853] M.G.L. ch. 149, § 52C.

[854] *Id.*

[855] *Id.*

[856] *Id.*

[857] For example, it is not clear whether an employer is required to notify an employee of a casual e-mail exchange between managers criticizing an employee's performance; whether an employer must notify an employee each time he or she makes a ministerial timekeeping error; or whether an employer is required to notify an employee of negative information documented during an internal investigation that lasts more than ten days. It also is not clear when and how the determination is made as to whether information "may be used" to negatively affect the employee.

courts or the Massachusetts Attorney General provided guidance as to the meaning of the amendment.

A personnel record cannot include "information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of such other person's privacy."[858]

Under the law, an employer and an employee may agree to remove information from a personnel record "for any reason."[859] 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.[860] 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 "through the collective bargaining agreement, other personnel procedures or judicial process."[861]

The Personnel Records law requires all employers 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 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.[862] Employers may limit the frequency of employee requests to review personnel records to twice per year.[863] However, a review stemming from the placement of negative information into an employee's personnel record does not count as one of the two annually permitted reviews.[864] Although an employee cannot recover damages for violations of the statute,[865] the Office of Massachusetts Attorney General enforces it and may seek a fine of not less than $500 and no more than $2,500 per violation.[866]

[858] M.G.L. ch. 149, § 52C.

[859] *Id.*

[860] *Id.*

[861] *Id.*

[862] *Id.*

[863] M.G.L. ch. 149, § 52C.

[864] *Id.*

[865] *See Duffy v. AT&T Network Sys., Inc.*, 50 F.3d 1, 1 (1st Cir. 1995). Notably, an individual employee does have the right to seek a judicial determination of whether a document qualifies as a "personnel record." *See Kessler v. Cambridge Health Alliance*, 62 Mass. App. Ct. 589, 597, 818 N.E.2d 582, 588 (2004).

[866] M.G.L. ch. 149, § 52C.

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

On January 31, 2013, "An Act Establishing a Temporary Workers Right to Know" went into effect in Massachusetts.[867] The law, which amended Massachusetts General Laws Chapter 149, Section 159C, requires "staffing agencies" to provide temporary employees with comprehensive, individualized, pre-employment information regarding each new work assignment ("notice requirements"), 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.[868]

In December 2014, the DLS issued "Employment Agency and Temporary Workers Right To Know Regulations" to carry out the provisions of the law.[869] The regulations define "staffing agencies" subject to the law and distinguish "staffing agencies" from "employment agencies," which are subject to their own regulations, in the following manner:

- A "staffing agency" is defined as an individual or company "that procures or provides temporary or part-time employment to an individual who then works under the supervision or direction of a worksite employer."[870]

- An "employment agency" is defined as an individual or company that, for a fee, "procures or attempts to procure permanent or temporary help or employment." The regulations expressly exclude individuals or companies "employing individuals directly for the purpose of furnishing part time or temporary help" from the definition of an "employment agency."[871]

1. Notice Requirements

The focus of the Act is the new notice requirements, which require staffing agencies to provide temporary employees written notices concerning the following:[872]

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[867] M.G.L. ch. 149, § 159C.

[868] *Id.*

[869] 454 C.M.R. § 24.00.

[870] 454 C.M.R. § 24.02.

[871] *Id.* Employment agencies are subject to their own provisions of the regulations, *infra* note 872. However, an "employment agency" might also be a "staffing agency" subject to the law and the "staffing agency" regulations.

[872] The regulations provide separate notice requirements that employment agencies must provide in writing to job applicants or workers within two days of assignment or employment. Those requirements include a written descripition of the nature of the duties required for any employment; the name and address of the client to whom the employment agency has referred or placed the individual; anticipated compensation; the start date and, if known, anticipated duration of the assignment; the total fees to be paid by the individual to the employment agency; transporation arrangements and charges; a copy of the contract executed between the employment agency and the individual; and a receipt for every fee assessed by the employment agency to the individual. 454 C.M.R. § 24.07.

- The name, address, and telephone number of (i) the staffing agency or the agent "facilitating" the work placement; (ii) the staffing agency's workers' compensation carrier; (iii) the work site employer; and (iv) the DLS

- A description of the position and whether it requires special clothing, equipment, training, or licenses, and any costs charged to the employee for supplies or training

- The designated pay day, hourly rate of pay, starting time, anticipated end time, whether "overtime pay may occur," and, when known, the expected duration of employment

- Whether any meals will be provided by the agency or work site employer and the charge, if any, to the employee

- Details concerning the means of transportation to the work site and any transportation fees charged by the staffing agency or work site employer for transportation services[873]

The DLS has drafted a "Sample Job Order" that contains the required information.[874] If a staffing agency conveys this information to the employee by telephone initially, it must confirm the terms in writing in a form (fax, mail, in person, or e-mail) designated by the employee before the end of the first pay period. Any changes to these initial terms must be immediately provided to, and acknowledged by, the employee.[875] Staffing agencies will be required to display a poster listing these requirements, and the telephone number of the DLS, in a conspicuous location within their places of business. The DLS has created a sample "Notice of Rights" poster.[876]

The new notice requirements do not apply to two categories of employees: (1) "professional employees," as defined in the federal Fair Labor Standards Act, 29 U.S.C. § 152;[877] and (2) secretaries or administrative assistants with certain enumerated duties.[878]

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[873] M.G.L. ch. 149, § 159C.

[874] Available at http://www.mass.gov/lwd/labor-standards/employment-agency/employment-placement-and-staffing-agencies-program/sample-job-order.html (last visited Jan. 11, 2017).

[875] M.G.L. ch. 149, § 159C.

[876] Available at http://www.mass.gov/lwd/labor-standards/employment-agency/employment-placement-and-staffing-agencies-program/notice-of-rights.html (last visited Jan. 11, 2017).

[877] 29 U.S.C. § 152 defines a "professional employee" as follows: "(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; [and] (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of [subsection (a)]; and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in [subsection (a)]."

2. Limitations on Fees Charged to Temporary Workers

The law prohibits staffing agencies and work site employers from charging fees to temporary workers for the following:[879]

- The cost of registering with the agency or for procuring employment
- Any goods or services unless there is a written contract that states in clear language that the contract is voluntary and provides that the employer will not profit from the fee
- Issuing a bank card, debit card, payroll card, voucher, draft, money order or similar form of payment or wages; or any drug screen that exceeds the actual cost per applicant/employee
- Any goods or services that would cause the applicant or employee to earn less than the minimum wage
- A criminal offender record information (CORI) request
- Transportation, unless the charge is no more than the actual cost of the transportation, does not exceed 3 percent of the employee's total daily wages, does not reduce the employee's daily wages to below the minimum wage, and is not for transportation that the employee was required to use by the staffing agency, work site employer, or person acting in either's interest[880]

The law also prohibits staffing agencies and work site employers from deducting any costs or fees from the wages of an employee without express written authorization from that employee. Under the law, a staffing agency or work site employer must furnish to an employee a copy of the signed authorization in a language that the employee can understand.[881]

In addition, a staffing agency must reimburse a temporary employee's transportation costs if it sends the employee to a work site but no job is available that day.[882]

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[878] A secretary or administrative assistant qualifies for this exception if his or her main or primary duties involve one or more of the following: drafting or revising correspondence; scheduling appointments; creating, organizing, and maintaining paper and electronic files; and providing information to callers or visitors. M.G.L. ch. 149, § 159C.

[879] This section describes fees that staffing agencies cannot charge to temporary workers. The regulations provide detailed provisions on fees that employment agencies *can* charge to certain workers. 454 C.M.R. § 24.09.

[880] M.G.L. ch. 149, § 159C.

[881] *Id.*

[882] *Id.*

3. Additional Restrictions

The Act places some additional restrictions on staffing agencies. Staffing agencies may not:

- "[K]nowingly issue, distribute, circulate or provide any false, fraudulent, or misleading information, representation, promise, notice or advertisement to any applicant or employee"
- Use any name that they have not registered with the DLS
- Assign or place an employee by force, fraud, or for illegal purposes
- Assign or place an employee "where the employment is in violation of state or federal laws governing minimum wage, child labor, compulsory school attendance, required licensure or certification, or at any location that is on strike or lockout without notifying the employee of this fact"
- Refuse to return personal belongings or fees or charges in excess of what is allowed under the statute to an employee[883]

4. Enforcement and Penalties

The DLS interprets the law,[884] and the Office of Massachusetts Attorney General is responsible for enforcing it.[885] Violations of the law are subject to criminal and civil sanctions, including criminal penalties of up to two years in jail and fines of up to $50,000, and civil penalties of up to $25,000 per violation.[886]

XIV. JOINT EMPLOYERS

Except in the context of determinations of individual liability, Massachusetts appellate courts have not addressed the circumstances in which two employers may be held jointly liable for wage violations. The term "employer" is defined for purposes of Massachusetts overtime and minimum wage as "[a]n individual, corporation, partnership or other entity, including any agent thereof, that engages the services of an employee or employees for wages, remuneration or other compensation."[887] This definition does not expressly exclude the possibility that an employee may have more than one employer, and the Massachusetts Attorney General has sometimes sought to hold more than one entity liable for alleged minimum wage violations under state law.

[883] *Id.*

[884] *Id.*

[885] M.G.L. ch. 149, §§ 27C(b)(1), 159C.

[886] M.G.L. ch. 149, §§ 27C(a)(1), 159C.

[887] 454 C.M.R. § 27.02

While the Commonwealth's standard for joint employment remains uncertain, the standard under federal law is more clear and may be likely to guide Massachusetts courts. The First Circuit has articulated four factors to be used to determine whether "economic reality" dictates that an entity is a joint employer under the FLSA:[888] "whether the alleged employer (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records."[889] The first two of these factors address the putative joint employer's "control over the nature and structure of the working relationship," while the second two factors address "the extent of a putative employer's control over the economic aspects of the working relationship."[890]

The interpretation of this "economic realities" test was expanded in 2015 and 2016 by two federal agencies: the NLRB and the DOL. While the NLRB expressly asserted that it was not adopting an "economic realities" test, in reality its common-law joint employment test reflects little actual difference. Thus, in its August 2015 *Browning-Ferris* decision, the Board expanded the definition of joint employment by stating a new test.[891] Under the Board's prior joint employer test, the putative joint employer had to possess or share *actual*, direct control over essential employment terms. In expressly overruling any prior precedent, the NLRB found that two or more entities will be considered "joint employers" if both exercise either the actual or *potential* authority to control the workforce. The NLRB noted that "right to control, in the common-law sense, is as probative of joint-employer status, as is the actual exercise of control whether direct

[888] While no Massachusetts appellate court has established the test for joint employment in the wage and hour context, at least one lower court has. That court followed the First Circuit's four-factor test. *See Garcia v. Right At Home, Inc*., 2016 WL 3144372, at *3 (Mass. Super. Ct. Jan. 19, 2016).

[889] *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998).

[890] *Id*. at 675-76. The Second Circuit has adopted a different formulation of the test for joint employer relationships, which like the *Baystate* test focuses on the "economic reality" of the relationship. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003). In *Zheng*, the Second Circuit addressed whether an apparel company was a joint employer of the contractors that assembled its garments by asking:

> (1) the extent to which the workers perform a discrete line-job forming an integral part of the putative joint employer's integrated process of production or overall business objective; (2) whether the putative joint employer's premises and equipment were used for the work; (3) the extent of the putative employees' work for the putative joint employer; (4) the permanence or duration of the working relationship between the workers and the putative joint employer; (5) the degree of control exercised by the putative joint employer over the workers; (6) whether responsibility under the contract with the putative joint employer passed "without material changes" from one group of potential joint employees to another; and (7) whether the workers had a "business organization" that could or did shift as a unit from one putative joint employer to another.

Id. at 68. The DOL has addressed wage violations resulting from joint employer relationships as a species of independent contractor misclassification—in effect, the joint employer treats the employee as a contractor whose services are obtained through another entity. As part of its focus on independent contractor misclassification, the DOL has also ramped up enforcement in joint employer situations. *See* DOL WHD Press Release, *US Labor Department obtains joint employment judgment ordering DirecTV to pay $395K in back wages and damages to 147 cable installers in Washington* (Oct. 22, 2015) (describing enforcement action finding that DirecTV was a joint employer of installers and, hence, responsible for various FLSA violations), available at http://www.dol.gov/opa/media/press/whd/WHD20152036.htm (last visited Jan. 11, 2017).

[891] Efforts began in both the House (HR 3459) and Senate (S 2015) to require the Board to revert to the previous definition of joint employer, but the *Browning-Ferris* test remains the Board's operative standard. With union-influenced Democrats able to filibuster labor law reform in the Senate, a congressional revision of the *Browning-Ferris* doctrine does not seem imminent.

or indirect." Accordingly, under the Board's new test, merely having the authority to control essential terms and conditions of employment is sufficient to make an entity a joint employer.

Likewise, in January 2016, the DOL's Wage & Hour Division (WHD) under the Obama Administration issued an Administrator's Interpretation (the AI or Guidance) that describes in detail the WHD's opinion of the criteria for determining whether two or more businesses are joint employers and therefore may be held jointly and severally responsible for fulfilling minimum wage, overtime, and other obligations under the FLSA. As persuasive authority, the AI would call for the courts and WHD investigators to apply an "expansive" definition when deciding whether two or more businesses are responsible for a single employee's pay and when a business employs a worker who is more clearly employed by a third party. Harkening to its explanation of why most independent contractors are, in its view, actually employees, the AI explains that a business is responsible for work performed by a third party's employee if the economic realities demonstrate an employment relationship and if the business "suffers and permits" the work. This latest AI also expands the "economic realities" test with similar import as the *Browning-Ferris* decision. Taken together, employers should be cautious when engaging the services of another's employees and understand the possibility of joint employment under these expanded definitions. It is unclear whether the WHD under the new Administration will issue new guidance

XV. 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.[892] The employer can incur liability for retaliation even if the employee's underlying wage and hour complaint has no merit. However, if the underlying claim is meritless, the employee must demonstrate that he or she acted on a good faith belief in making the complaint.[893]

Massachusetts forbids employers from taking *any* employment actions that penalize employees for pursuing their wage and hour rights.[894] Activities protected by the anti-retaliation laws include complaining to the Attorney General or any other person, assisting the Attorney General in any wage and hour investigation, instituting (or causing to be instituted) any proceeding related

[892] *See* M.G.L. ch. 149, § 148A and M.G.L. ch. 151, § 19. The FLSA also forbids retaliation, making it unlawful for an employer "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter . . . ." 29 U.S.C. § 215(a)(3). However, while oral complaints made to a public employer may be sufficient grounds for a retaliation claim under the FLSA, it is unclear whether oral complaints made to private employers qualify as protected activity. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 131 S. Ct. 1325, 1336, 179 L.Ed.2d 379 (2011) (declining to reach issue as to private employers).

[893] *Smith*, 447 Mass. at 364 n.4 ("viability [of a wage and hour retaliation claim] does not depend on the success of the underlying discrimination claim, so long as the plaintiff can prove that he 'reasonably and in good faith believed the [the employer] was engaged in wrongful discrimination'") (quoting *Tate v. Dep't of Mental Health*, 419 Mass. 356, 364, 645 N.E.2d. 1159 (1995)). However, a worker cannot, as a matter of law, state a claim for retaliation under the Minimum Wage Law where the worker admittedly earned in excess of the statutory minimum wage and the alleged protected activity was the worker's demand for an even higher hourly wage. DLS Opinion Letter MW-2016-07.13.16 (July 13, 2016).

[894] M.G.L. ch. 149, § 148A.

to wage and hour violations, and testifying (or being prepared to testify) in such a proceeding.[895] The Commonwealth's anti-retaliation laws also protect employees who make *internal* wage and hour complaints. A formal complaint to the Attorney General is not required.[896] The SJC has held, however, that merely reporting another employee's wage and hour concerns is not protected activity.[897] For example, when a manager told a restaurant owner that waiters believed a tip-pooling arrangement was illegal, he was not asserting the servers' rights or complaining on their behalf, and he therefore could not claim retaliation when the owner subsequently terminated his employment.[898] Similarly, complaining to a third party, such as a customer, is not protected conduct under the statute.[899]

Retaliatory actions, termed "adverse employment actions," can include termination or any other type of discrimination.[900] Constructive discharge is also unlawful retaliation in Massachusetts. It occurs when "the employer's conduct effectively forces an employee to resign."[901] There are two types of constructive discharge.[902] First, the employer might create intolerable working conditions that are objectively "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."[903] Second, the employer might demote the employee or reduce his or her status by giving the employee's job to someone else, transferring the employee's responsibilities to another (thus removing his or her authority), or reassigning the employee to a nonexistent job.[904]

Penalties for retaliation are discussed in Section XVIII. In addition to the punishments listed there, any employer or individual who retaliates based on complaints related to overtime pay or minimum wage violations are subject to extra penalties.[905] These additional penalties include

[895] *Id.*

[896] *See generally Smith*, 447 Mass. 363.

[897] *Id.*

[898] *Id.* An employee also cannot assert common law wrongful discharge claims under these circumstances. The SJC has noted that—while simple contract claims for unpaid wages are not preempted by ch. 149, § 148—common law retaliation claims are preempted by § 148A because "when the Legislature has provided a statutory cause of action to an at-will employee who has been discharged for exercising her statutory rights, there is no need to add a common-law remedy." *Lipsitt v. Plaud*, 466 Mass. 240, 247 (2013) (quoting *Dobin v. CIOview Corp.*, 16 Mass. L. Rptr. 785, 2003 WL 22454602) (Mass. Super. Ct. Oct. 29, 2003)).

[899] *Benoit v. The Federalist, Inc.*, No. SUCV2004-3516-B (Mass. Super. Ct. June 30, 2006) (Locke, J.) (holding that employee who complained to customers had not engaged in protected conduct under anti-retaliation provision).

[900] M.G.L. ch. 149, § 148A.

[901] *Vonachen v. Computer Assocs. Int'l, Inc.*, 524 F. Supp. 2d 129, 137-38 (D. Mass. 2007).

[902] *Id.* at 138.

[903] *Id.*

[904] *Id.* at 139.

[905] M.G.L. ch. 151, § 19. For overtime complaints, these additional penalties only apply to retaliatory actions taken by private employers. Penalties for retaliation related to overtime pay by public employers and state police are restricted to those listed in Penalties and Enforcement, Section XVIII. *See* M.G.L. ch. 149, §§ 148A, 30C, and 33B-33C.

damages of between one and two months' wages, plus the costs of bringing the action and reasonable attorneys' fees.[906] Plaintiffs may not recover damages for emotional distress.[907]

XVI. STATUTES OF LIMITATIONS

Employees must bring civil wage and hour claims against employers within three years of a violation, depending on the type of violation involved.[908] A table listing the statutes of limitations for the wage and hour violations that are subject to private rights of action in Massachusetts appear in the following section. The statute of limitations usually begins running on the earliest date when the employee reasonably could or should have known of the violation.[909] If the violation is ongoing, only those individual violations which fall within the statute of limitations are timely.[910] 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.[911]

If an employee "or a similarly situated employee" files a wage complaint with the Attorney General's Office, the three-year limitations period is tolled from the date of the complaint until the Attorney General issues a letter authorizing the employee to bring an action or the date an enforcement action becomes final.[912] Neither the courts nor the Attorney General's Office have issued guidance explaining the "similarly situated employee" language in the recently added tolling provision.[913]

[906] M.G.L. ch. 151, § 19.

[907] *Somers v. Converged Access, Inc.*, 23 Mass. L. Rptr. 511, 2008 WL 497982, at *8 (Mass. Super. Ct. Jan. 23, 2008) (*Somers* I), *overruled on other grounds*, *Somers* II, 454 Mass. 582.

[908] M.G.L. ch. 149, § 150; M.G.L. ch. 151, § 20A.

[909] *Koe v. Mercer*, 450 Mass. 97, 101, 876 N.E.2d 831 (2007) ("Under [the] discovery rule, the statute of limitations starts when the plaintiff discovers, or reasonably should have discovered, that [he or she] has been harmed or may have been harmed by the defendant's conduct.") (internal quotations and citation omitted).

[910] *Williamson*, 2004 WL 1050582, at *16-17 (rejecting continuing violation theory in wage case).

[911] There is a six-year statute of limitations on breach of contract claims, except those to recover for personal injuries. M.G.L. ch. 260, § 2. Most torts have a three-year statute of limitations. M.G.L. ch. 260, § 2A. The SJC held in 2013 that simple contract claims for unpaid wages are not preempted by the Commonwealth's wage statutes because such causes of action pre-date the statutes. *Lipsitt*, 466 Mass. at 247. However, the Court noted that common law claims based on rights created by statute—such as claims for prevailing wages, retaliation for making a wage complaint, or for violations of the Tip Statute—are preempted by the statutes on which they are based. *Id.* at 247 n.11 (citing with approval *DePina v. Marriott Int'l, Inc.*, 2009 WL 8554874 (Mass. Super. Ct. 2009), *Dobin v. CIOview Corp.*, 2003 WL 22454602 (Mass. Super. Ct. 2003), and *George v. Nat'l Water Main Cleaning Co.*, 286 F.R.D. 168, 188 (D. Mass. 2012)).

[912] M.G.L. ch. 149, § 150.

[913] The tolling provision was added to the statute in 2014 as part of *An Act Restoring the Minimum Wage and Providing Unemployment Insurance Reforms*, Chapter 144 of the Acts of 2014.

XVII. ATTORNEY GENERAL'S OFFICE COMPLAINTS AND INVESTIGATIONS

An employee seeking redress of certain wage and hour violations is expected to file a complaint with the Office of Massachusetts Attorney General,[914] which then will choose to dismiss the complaint, investigate it, or authorize the employee to pursue an independent civil action.[915] The Attorney General's Office has indicated that it is currently placing a higher priority on cases related to wage theft and misclassification of individuals as independent contractors.[916] Employers have also noted an increase in Attorney General investigations related to meal break violations, as well as more investigations undertaken without the Attorney General having received an employee complaint.[917] For example, in early 2016, the Office of the Attorney General sent letters to employers demanding pay information to determine whether employers' pay practices differed based on race or gender.

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, the SJC has held that 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."[918] The following table lists the statutes of limitations for those wage and hour violations that include a private right of action in Massachusetts.

[914] M.G.L. ch. 149, §§ 2 and 150.

[915] *See* M.G.L. ch. 149, § 150.

[916] In 2014, Massachusetts enacted *An Act Restoring the Minimum Wage and Providing Unemployment Insurance Reforms*, which, among other provisions, established the Council on the Underground Economy (CUE). The CUE is a permanent entity responsible for coordinating the Commonwealth's efforts to combat the underground economy and employee misclassification. *See* M.G.L. ch. 23, § 25. It includes the chief of the Attorney General's Fair Labor Division, as well as representatives from the Massachusetts Department of Revenue and Department of Unemployment Assistance, among others. In its most recent annual report, the CUE (then known as the Joint Task Force on the Underground Economy and Employee Misclassification) announced that it had recovered more than $20 million in restitution, unemployment contributions, fines, and penalties. The annual report is available at http://www.mass.gov/lwd/eolwd/cue/jtf-annual-report-2014.pdf (last visited Jan. 11, 2017).

[917] *See, e.g.*, Office of Massachusetts Attorney General Press Release, *Children's Retailer Settles Claims It Violated the Massachusetts Meal Break Law* (Mar. 9, 2012), available at http://www.mass.gov/ago/news-and-updates/press-releases/2012/2012-03-09-gymboree-settlement.html (last visited Jan. 11, 2017).

[918] *See Depianti v. Jan-Pro Franchising Int'l, Inc.*, 465 Mass. 607 (2013).

Statutes of Limitations in Massachusetts

Offense with a Private Right of Action	Statute of Limitations
Overtime pay violations (M.G.L. ch. 151, § 1A) Minimum wage violations (M.G.L. ch. 151, § 1)	For claims arising prior to Nov.18, 2014: 2 years For claims arising on or after Nov. 18, 2014: 3 years[919]
Nonpayment of wages (M.G.L. ch. 149, § 148) Tip Statute violations (M.G.L. ch. 149, § 152A) Independent Contractor Statute violations (M.G.L. ch. 149, § 148B) Improper expenditure of withholdings (M.G.L. ch. 149, § 150C) Improper deductions for tardiness or transportation services (M.G.L. ch. 149, § 152) Retaliation (M.G.L. ch. 149, § 148A)	3 years[920]

A. Procedure for Filing a Complaint with the Office of the Massachusetts Attorney General

If an employee has a claim for unpaid wages—including nonpayment of wages, earned vacation wages, tips, or meal breaks—an employee may file a complaint with the Fair Labor Division of the Attorney General's Office.[921] Employees may also file a complaint for unpaid wages with the Office of the Attorney General, alleging that the employer paid them less than employees of the opposite sex who performed the same or comparable work.[922] Employees complaining of overtime or minimum wage violations may proceed directly to Superior Court because they are not required to file a complaint with the Office of the Attorney General.

To file a complaint with the Office of the Attorney General, an employee must complete a complaint form and provide supporting documentation.[923] The complaint form must include the

[919] M.G.L. ch. 151, § 20A. In 2012, the SJC held that employees can recover unpaid overtime beyond the two-year statute of limitations under the nonpayment of wages statute, but recovery was limited to straight-time pay. *See Crocker v. Townsend Oil Co.*, 464 Mass. 1, 3 (2012). In response to that decision, in 2014, the statute of limitations for overtime claims was extended to three years. *See An Act Restoring the Minimum Wage and Providing Unemployment Insurance Reforms*, Chapter 144 of the Acts of 2014.

[920] M.G.L. ch. 149, § 150.

[921] Office of the Massachusetts Attorney General, *File a Wage Complaint*, available at http://www.mass.gov/ago/doing-business-in-massachusetts/workplace-rights/file-a-complaint.html (last visited Jan. 11, 2017).

[922] *Id.*

[923] Office of the Massachusetts Attorney General, *Non-Payment of Wage and Workplace Complaint Form*, available at https://www.eform.ago.state.ma.us/ago_eforms/forms/npwc_ecomplaint.action (last visited Jan. 11, 2017). Complaints under the prevailing wage law utilize a different form: *Prevailing Wage Complaint Form*, available at https://www.eform.ago.state.ma.us/ago_eforms/forms/pwc_ecomplaint.action (last visited Jan. 11, 2017). The employee must still

following information: the employer's name and complete address; the type of work performed; the employee's rate of pay; the amount of wages owed; the dates of work for which the employee is owed wages; the exact location of work; whether the employee demanded compensation and, if so, the employer's response; copies of pay stubs; and any other information pertinent to the claim.[924]

The employee may bring a private action against the employer ninety days after complaining to the Attorney General.[925] The employee may sue sooner if he or she receives written permission from the Attorney General.[926] However, as discussed in the preceding section, the failure to first file a complaint with the Attorney General is not a jurisdictional bar to a private lawsuit.

B. The Attorney General's Investigatory Procedure

The Massachusetts Office of the Attorney General may take several weeks or longer to process a complaint.[927] Following receipt of a complaint, the Attorney General mails a copy of the complaint to the employer along with a cover letter explaining the charges.[928] Pursuant to the Attorney General's authority to investigate wage complaints and ensure compliance with the laws, the Attorney General may conduct work site inspections.[929] These inspections can be conducted without prior notice. If the inspector gives advance notice of an upcoming visit, the employer may request a convenient appointment time even though the inspector is not obligated to honor this request.[930]

During a site inspection, the Attorney General's representative typically carries business cards or an identification badge to display upon request, and should answer general questions about the nature of the investigation whenever possible.[931] The site inspector may also take notes, carry a voice recorder, and use a camera to document work conditions.[932] He or she is likely to interview employees on-site, hand out questionnaires for completion on-site or after work, and request that

provide complete information in order for the Attorney General's Office to process his or her complaint. *File a Wage Complaint*, *supra* note 921.

[924] *File a Wage Complaint*, *supra* note 921.

[925] M.G.L. ch. 149, § 150.

[926] *Id.*

[927] *File a Wage Complaint*, *supra* note 921.

[928] *Id.*

[929] Office of the Massachusetts Attorney General, Fair Labor Division, Business & Labor Bureau, *Fair Labor Site Inspections* [undated internal document] (hereinafter, "*Fair Labor Site Inspections*") on file with authors (citing M.G.L. ch. 23, § 3; M.G.L. ch. 151, §§ 3, 15, 17, 19(3); M.G.L. ch. 149, §§ 2, 3, 5, 10, 17, 79). This document lays out general guidelines for conducting site inspections, but the Attorney General's Office explicitly reserves the right to "exercise its statutory authority as it deems necessary."

[930] E-mail from J. Jones, Deputy Chief, Fair Labor Division, Office of Massachusetts Attorney General, to B. Gobeille, Associate, Seyfarth Shaw LLP (Feb. 4, 2009) (hereinafter, "*E-mail from Fair Labor Division*") on file with authors.

[931] *Fair Labor Site Inspections*, *supra* note 929.

[932] *Id.*

the employer provide contact information for employees and supervisors.[933] The employer may ask to have a company representative sit in on employee interviews, but it does not have a right to do so.[934] The site inspector may also request copies of payroll records and prevailing wage schedules.[935]

If the Attorney General's Office determines that a wage and hour violation has occurred, it can issue a citation that requires restitutionary payments to the complainant (or to a larger group of similarly situated employees) and impose a fine. The Attorney General also has the authority to pursue a criminal investigation that could lead to criminal charges, which are detailed in the following section. An employer should retain counsel immediately, even if the complaint is narrow, because the Attorney General may investigate any additional violations beyond the scope of the original complaint that are uncovered. During the course of the investigation, the employer's counsel may negotiate a resolution of the dispute with the Attorney General's Office.

C. Resolution of Complaints and Other Violations

Federal law prohibits purely private settlements of wage claims because employees may not waive their wage and hour rights.[936] Under the FLSA, parties can enter into a settlement agreement if a court or the DOL supervises the agreement.[937] Because Massachusetts law has no similar requirement, private settlements of state claims are allowed. However, to be valid, a waiver and release of wage claims under Massachusetts law must be knowing and voluntary and must contain express language that Wage Act claims are being released.[938] Further, where both Massachusetts and federal wage and hour claims are at issue, employers must still be mindful of the federal requirements for private settlements.

If an employer uncovers a wage and hour violation, through an internal audit or other means, the employer has various options, each of which carries its own risks:

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[933] *Id.*

[934] *E-mail from Fair Labor Division*, *supra* note 930.

[935] *Fair Labor Site Inspections*, *supra* note 929.

[936] *See, e.g.*, *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704, 65 S. Ct. 895, 89 L.Ed. 1296 (1945) (holding that FLSA claims may not be waived because "[w]here a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate").

[937] 29 U.S.C. § 216(c). Regarding judicially supervised settlements, the U.S. Supreme Court has distinguished between unsupervised settlement agreements and stipulated agreements. *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S. Ct. 925, 90 L.Ed.1114 (1946). Subsequent federal court decisions have upheld stipulated judgments releasing FLSA claims when those judgments were court-supervised and scrutinized for fairness to the employee. *See, e.g., Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982) ("When employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness.").

[938] *Crocker*, 464 Mass. 1. The Supreme Judicial Court explained in *Crocker* that the "release must be plainly worded and understandable to the average individual, and it must specifically refer to the rights and claims under the Wage Act that the employee is waiving."

- The employer could pay any affected employee the additional wages due as a result of the error, and forego obtaining a release of claims. Settling or providing pay without a release leaves the employer exposed to future claims and civil citations from the Office of the Attorney General.[939]

- The employer could voluntarily report the violation to the DOL and request that the agency facilitate a settlement with a release of claims. Self-reporting to the DOL risks a broader and more expensive audit and exposure if other violations are uncovered.

- The employer and employee could agree to simultaneously file with the court a complaint and notice of settlement to obtain a court-supervised settlement with a release of claims. Filing a complaint with the court is more procedurally complicated and potentially expensive, and it usually requires that the employee have his or her own attorney, which may invite further litigation.

- The employer may decide to change the practice prospectively, but not offer back pay to remedy past violations. This would not decrease its legal exposure for those violations.

Given the myriad risks and considerations, the employer should consult with counsel before pursuing any of these options.

XVIII. PENALTIES AND ENFORCEMENT

A. Individual Liability

In addition to corporate liability, the Wage Act imposes personal civil and criminal liability on certain individuals. Specifically, "[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.[940] Generally, directors of a corporation may not be held liable under the Wage Act, absent evidence that they also performed corporate management functions.[941] Outside of corporate entities, managers of an LLC, or other limited liability business entities may be liable under the Wage Act.[942]

While there are a limited number of decisions interpreting the definition of an "employer" for purposes of personal liability, a few key points have emerged from the case law. To avoid personal liability, an individual must not be a president or treasurer of a company or the

[939] *See* Penalties and Enforcement, Section XVIII.

[940] M.G.L. ch. 149, § 148.

[941] *Perrin v. The Collaborative Engineers, Inc.*, 2013 WL 6096937 (Mass. App. Ct. Nov. 21, 2013) (unpub.).

[942] *Cook v. Patient EDU, LLC*, 465 Mass. 548 (2013).

functional equivalent of either role in terms of responsibilities.[943] If an individual plays a large role in determining the corporation's policies, particularly with respect to employee compensation, he or she is more likely to be held personally liable for violations of the Wage Act, regardless of title.[944] However, merely holding a managerial position over a branch, division, or office does not, by itself, mean that a manager has the "management" of the "corporation" as a whole.[945] Rather in determining whether a manager can be personally liable for Wage Act violations, courts will examine whether the manager "controls, directs, and participates to a substantial degree in formulating and determining [the] policy of the corporation."[946] The reported decisions in which individual defendants have avoided personal liability are those in which it was clear that the individual had a limited, if any, role in top-level management and formulation of corporate policies.[947]

Employers and individuals who violate Massachusetts wage and hour laws are subject to civil penalties and, though rarely imposed, criminal penalties. The penalties applicable to individuals and businesses are set forth below.

B. Criminal Penalties

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.[948] Criminal charges were filed and prison terms were imposed against the company owners in one recent case in which the employer failed to provide accurate payroll information to the Department of Unemployment Assistance during an independent contractor misclassification audit.[949]

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[943] M.G.L. ch. 149, § 148; *Sterling Research, Inc. v. Pietrobono*, 2005 WL 3116759 (D. Mass. Nov. 21, 2005) (holding corporation's president and treasurer could not escape individual liability by claiming he was not responsible for payroll issues but instead relied on accountant and independent payroll company to handle such matters).

[944] *Bisson v. Ptech, Inc.*, 2004 WL 2434638, at *2 (Mass. Super. Ct. Oct. 19, 2004) ("[T]he Legislature did not wish to allow the persons who performed the duties of the president and treasurer to be able to escape their obligations timely to pay wages under the Wage Act merely by giving themselves different titles or by avoiding any formal title.").

[945] *Wiedmann*, 444 Mass. at 711.

[946] *Id.* (quoting *Goodrow*, 432 Mass. at 173).

[947] *See, e.g., id.* (manager not personally liable because "there was insufficient evidence to determine that [he] directed and participated to a substantial degree in formulating the corporation's policy"); *Bisson*, 2004 WL 2434638, at *2 (outside directors not personally liable despite "active participation" in management because neither one had "effectively assumed the duties of the president or treasurer"); *York v. On-Site Commc'ns, Inc.*, 2000 WL 1511405, at *3 (Mass. Super. Ct. Sept. 19, 2000) (holding 93 percent shareholder and director not personally liable because he merely "invested in [the employer entity], gave his son advice in running the company and only advanced funds for corporate endeavors he deemed valuable").

[948] M.G.L. ch. 149, § 27C(a)(1)-(2). While no court has defined willfulness in the criminal context, the SJC found harsher civil penalties for wage violations to be appropriate where the defendant's behavior was "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Wiedmann*, 444 Mass. at 710 (internal quotations and citations omitted).

[949] Office of Massachusetts Attorney General Press Release, *Watertown Roofing Company and Its Owners Plead Guilty and Are Sentenced for Labor Violations* (Jan. 10, 2012), available at http://www.mass.gov/ago/news-and-updates/press-releases/2012/2012-01-10-newton-contracting-plea.html (last visited Jan. 11, 2017). The company and its two owners pled guilty

C. Civil Penalties Imposed by the Attorney General

The Attorney General may issue a written warning or a civil citation in lieu of initiating criminal proceedings.[950] Each failure to pay an employee the appropriate amount in a given pay period may be considered a new violation and receive a separate citation, at least in cases in which the employer has previously received a citation or where the citation results from a failure to pay overtime.[951] If an employer fails to keep accurate payroll records or refuses to furnish those records to the Attorney General upon demand, each day of failure or delay is a separate offense.[952] As a practical matter, employers that correct errors expeditiously and keep better records will minimize their liability.

The amount of a civil fine depends on whether the employer specifically intended to commit the violation, and whether the incident was a first offense.[953] The maximum civil and criminal penalties for wage and hour violations appear in the following table. These penalties do not include any damages or remedies that a court may order if a case proceeds to trial in a civil action.

Maximum Penalties for Wage and Hour Violations in Massachusetts

Penalties	Willful/Intentional Offenses		Non-Willful/Non-Intentional Offenses	
	First Offense	Subsequent Offense	First Offense	Subsequent Offense
Civil Fines	$15,000	$25,000	$7,500	$25,000
Criminal Fines	$25,000	$50,000	$10,000	$25,000
Imprisonment	1 year	2 years	6 months	1 year

Within these ranges, the Attorney General has discretion in setting the amount of a civil fine, taking into account the following factors: "the number of employees affected by the present violation or violations, the monetary extent of the alleged violations, and the total monetary amount of the public contract or payroll involved."[954]

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to four counts of workers' compensation premium evasion, twelve counts of unemployment contribution evasion, four counts of misclassification of employees as independent contractors, and failure to pay the prevailing wage. The criminal charges were filed after one of the company's owners failed to disclose over $2.4 million in misclassified subcontractor payroll to the DUA during an audit. The owners were sentenced to a two-year suspended sentence and two years' probation, respectively, and they were required to pay $100,000 in restitution to their workers' compensation insurer and over $200,000 in fines. They had already paid undisclosed amounts in restitution to the DUA and to their employees.

[950] M.G.L. ch. 149, § 27C(b)(1).

[951] *Id.*; *see* M.G.L. ch. 151, § 19; M.G.L. ch. 149, § 27C(b)(1).). The Attorney General has taken the position that each pay period may also give rise to a new violation in cases involving first-time non-overtime infractions, despite the presence of language in the statute suggesting otherwise.

[952] M.G.L. ch. 151, § 19(3).

[953] M.G.L. ch. 149, § 27C(b)(1)-(2).

[954] M.G.L. ch. 149, § 27C(b)(2).

As noted previously, employers that engage in retaliation are subject to the criminal and civil penalties listed here, and they must pay additional damages of between one and two months' wages, as well as reasonable attorneys' fees and costs.[955]

Massachusetts law imposes additional penalties for employers with government contracts or subcontracts that are criminally convicted of violating wage and hour laws. The Commonwealth bars these employers from entering into government contracts for any work related to the construction of public buildings or other public works for a specified period of time.[956] Employers that commit willful violations are barred for five years from the date of conviction.[957] Employers that commit non-willful violations are barred for six months from the date of conviction for a first offense or three years from the date of conviction for a subsequent offense.[958] Public contractors and their affiliates similarly are automatically debarred for two years upon receipt of three civil citations that include a finding of intent on three occasions within a three-year period.[959] Further, a public contractor or subcontractor will be barred from contracting with the Commonwealth or from performing any work under an existing contract if the contractor fails to comply with a civil citation or order.[960]

D. The Attorney General's Means of Enforcement

When an employer receives a civil citation or order from the Attorney General, the employer then has twenty-one days to comply fully.[961] The employer may appeal to the Massachusetts Division of Administrative Law Appeals within ten days and will then receive a hearing at which it must prove by a preponderance of the evidence that the Attorney General erred in issuing the citation or order.[962] If the hearing officer affirms the citation or order, the employer must either comply within thirty days or appeal to the Superior Court.[963]

If the employer does not pursue an appeal but also fails to comply with the citation or order in a timely manner, the Attorney General may file criminal charges against the company or certain individuals, or both.[964] The Attorney General may also add interest at a rate of 18 percent per annum and place a tax lien on the employer's real estate and personal property.[965] The tax lien

[955] M.G.L. ch. 151, § 19.

[956] M.G.L. ch. 149, § 27C(a)(3).

[957] *Id.*

[958] *Id.*

[959] *Id.*

[960] *Id.*

[961] M.G.L. ch. 149, § 27C(b)(6) (Attorney General may deliver citations and orders by mail or by hand delivery).

[962] M.G.L. ch. 149, § 27C(b)(4).

[963] M.G.L. ch. 149, § 27C(b)(5).

[964] M.G.L. ch. 149, § 27C(b)(6).

[965] M.G.L. ch. 149, § 27C(b)(7).

takes effect on the day after the payment was due.[966] To remove a tax lien, an employer must pay the full amount of the penalty, plus interest, to the Massachusetts Department of Revenue.[967]

E. Massachusetts Wage and Hour Class Actions

It has become increasingly common in recent years for plaintiffs in wage cases to assert their claims on a class action basis.[968] In a class action, the named plaintiff undertakes to act as the representative for a group of other individuals who share the same claim. Once a court certifies a lawsuit as a class action, the class members are bound by the result of the case, meaning that they will be entitled to recover damages if the named plaintiff wins and they will be precluded from bringing their own individual lawsuits even if the named plaintiff loses.[969]

A plaintiff who wishes to bring his or her suit as a class action in Massachusetts state courts must satisfy each of the prerequisites of Rule 23 of the Massachusetts Rules of Civil Procedure. Under that Rule, the plaintiff must prove that (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; (5) questions of law and fact common to the class predominate over questions affecting only individual class members; and (6) a class action is the superior method for adjudication of the case. Plaintiffs asserting claims under the Massachusetts Wage Act have sometimes argued that the Wage Act contains its own language authorizing class actions, and therefore they are not required to meet the requirements of Rule 23.[970] These plaintiffs have based their argument upon the statute's language permitting an employee to bring suit "for himself and others similarly situated . . . ."[971] Massachusetts courts have rejected this argument, holding that wage and hour plaintiffs are required to meet the test articulated in Rule 23.[972]

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[966] *Id.*

[967] Office of Massachusetts Attorney General, *Enforcement Authority* (2013), available at http://www.mass.gov/ago/doing-business-in-massachusetts/workplace-rights/enforcement-authority/ (last visited Jan. 11, 2017). The Massachusetts Department of Revenue's contact information is available at http://www.mass.gov/dor (last visited Jan. 11, 2017).

[968] This book is not intended to discuss this subject in detailed. For an in-depth discussion of this subject, see Seyfarth Shaw's Wage & Hour Litigation Practice Group's treatise *Wage & Hour Collective and Class Litigation* (Law Journal Press 2012, most recently updated 2016).

[969] *See Fletcher v. Cape Cod Gas Co.*, 394 Mass. 595, 602, 477 N.E.2d 116 (1985) (holding that class members could not exclude themselves from class that had been certified by the court). This differs from the federal rule governing class actions, which usually provides class members the choice to "opt out" of the class so that they will not be bound by the result. *See* Fed. R. Civ. P. 23(d). The FLSA also contains its own "collective action" procedures, pursuant to which a class member is only bound by the result of the suit if he or she affirmatively gives consent in writing to join the suit. *See* 29 U.S.C. § 216(b).

[970] *See, e.g.*, *Williamson*, 2004 WL 1050582, at *15 (rejecting plaintiff's argument); *see also Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 361-69 (2008) (reversing district court order decertifying class, based on an analysis of the class action requirements of Rule 23).

[971] M.G.L. ch. 149, § 150.

[972] *Williamson*, 2004 WL 1050582, at *15 (noting that "this entitlement argument . . . is notably lacking in legal support").

F. Arbitration

Claims under the Wage Act are arbitrable.[973] Employees have argued that mandatory arbitration clauses in employment agreements should not apply to wage and hour disputes, with at least one plaintiff arguing that arbitration clauses cannot apply to wage disputes because they constitute "special contracts" prohibited under the Wage Act.[974] The Appeals Court, however, rejected that argument, finding that claims under the Wage Act, like other statutory claims, can be arbitrated if the parties have an arbitration agreement that covers wage disputes.[975] The Court found that Massachusetts laws for interpreting contracts should be applied to determine whether an arbitration agreement covers wage disputes.[976] Thus, the Court looked to whether the employee voluntarily entered into the agreement and whether the language of the agreement was broad enough to encompass claims under the Wage Act.[977] While the agreement does not have to expressly mention the Wage Act in order to cover wage disputes, [978] employers that choose to enter into arbitration agreements should draft the agreement broadly enough to reflect their intent to arbitrate wage disputes.

Although the Appeals Court found that it could look to state contract law to determine the enforceability of an arbitration agreement, federal law limits a court's authority to find that an arbitration agreement is unenforceable under state contract law. Under the Federal Arbitration Act (FAA),[979] there is "a liberal federal policy favoring arbitration agreements."[980] In *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court found that the FAA preempts any state law that undermines the FAA's purpose of ensuring that arbitration agreements are enforced according to their terms.[981] The extent of the FAA's preemption is broad, preventing states from using any state laws or rules that would have a disproporationate impact on arbitration agreements in comparison to other types of contracts.[982] Acccordingly, the Court struck down a California law deeming class waivers in arbitration agreements to be unconscionable and therefore unenforeceable.[983] 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

[973] *Dixon v. Perry & Slesnick, P.C.*, 75 Mass. App. Ct. 271, 273-74, 914 N.E.2d 97, 99-100 (2009).

[974] *Id.*

[975] *Id.*

[976] *Id.*

[977] *Id*. at 277-78.

[978] *Machado v. System4 LLC*, 471 Mass. 204, 217-18, 218 n.19, 28 N.E.3d 401, 413-14, 414 n.19 (2015) (arbitration agreement covering "any claims" arising out of the relationship between the parties covers wage and hour disputes).

[979] 9 U.S.C. § 1 *et seq*.

[980] *Perry v. Thomas*, 482 U.S. 483, 489 (1987).

[981] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347 n.6, 351 (2011).

[982] *Id.* at 342.

[983] *Id*. at 337-38, 352, reversing the *Discover Bank* rule in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 162 (2005).

rules or laws that hinder the enforceability of arbitration agreements specifically.[984] Thus, under *Concepcion*, Massachusetts cannot place special requirements or limitations on arbitration ageements. Massachusetts, therefore, cannot prohibit the arbitration of particular types of claims, including wage and hour claims.[985]

Until recently, the enforceability of class action waivers in arbitration agreements was even more uncertain and complex, with Massachusetts courts taking a stricter view of the matter than their federal counterparts. However, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, the U.S. Supreme Court found that it is inconsistent with the FAA to impose class arbitration on a party whose arbitration clause is silent on the issue of class arbitration.[986] Shortly thereafter, in *Concepcion*, the U.S. Supreme Court ruled that states cannot force companies with arbitration provisions to allow class arbitrations.[987]

After *Stolt-Nielsen* and *Concepcion*, plaintiffs continued to argue that class action waivers in arbitration agreements were not enforceable as a matter of public policy in situations where the small value of a single plaintiff's claims rendered it impossible to effectively vindicate his or her rights in the absence of class proceedings. In June 2013, the SJC held that a class action waiver was unenforceable for this reason, essentially adopting the "effective vindication" doctrine.[988] Only days later, in *American Express Co. v. Italian Colors Restaurant*, the U.S. Supreme Court rejected this argument.[989] Shortly thereafter, the SJC recognized in a pair of rescript decisions that the "effective vindication" doctrine is no longer a proper basis to invalidate class action waivers in arbitration agreements, including for wage and hour claims.[990]

The NLRB has further complicated the issue of class action arbitration waivers by ruling that class action waivers violate Section 7 of the NLRA, which provides employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[991] In *In re D.R. Horton, Inc.*, the NLRB pursued unfair labor practice charges against an employer based on the use of pre-dispute mandatory arbitration agreements containing

[984] *Id.* at 341-43.

[985] *Id.* at 341.

[986] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 666, 687 130 S.Ct. 1758, 1764, 1776 (2010).

[987] *Id.* at 351-52 (holding state laws preempted by federal law where they invalidate arbitration class action waivers because the claims are likely to involve smaller dollar amounts, which would not likely be prosecuted on an individual basis).

[988] *Feeney v. Dell, Inc.*, 465 Mass. 470, 472, 989 N.E.2d 439 (2013) (holding that class action waiver was unenforceable where plaintiff's claim was of little monetary value and therefore individual arbitration was not realistic option under terms of arbitration agreement).

[989] *Am. Express Co. v. Italian Colors Rest.*, __U.S. __, 133 S. Ct. 2304, 2311-12 (2013) (holding that class waivers in arbitration agreements cannot be invalidated on the grounds that the inability to arbitrate on a classwide basis precludes "effective vindication" of plaintiffs' rights).

[990] *Feeney v. Dell, Inc.*, 466 Mass. 1001, 1002-03, 993 N.E.2d 329 (2013); *Machado v. System4 LLC*, 466 Mass. 1004, 993 N.E.2d 332 (2013).

[991] 29 U.S.C. § 157.

class action waiver clauses.[992] The U.S. Court of Appeals for the Fifth Circuit denied enforcement in relevant part of the NLRB's decision,[993] but the NLRB continues to follow its *D.R. Horton* ruling, effectively elevating the NLRA to the status of a "Super Class Action Statute," a result not contemplated by its drafters. Most courts of appeals to consider the issue, including the Second and Eighth Circuits, have followed the Fifth Circuit. However, the Seventh and Ninth Circuits have decided otherwise, holding that class action waivers violate the NLRA, consistent with the NLRB's position.[994] Four separate petitions for certiorari were filed with the U.S. Supreme Court on this issue.[995] The Supreme Court granted certiorari on January 13, 2017 on the issue and consolidated the cases for argument. Argument will be scheduled during the 2017 term with a decision likely prior to June 2018. Given the uncertainty regarding the enforceability of class action waiver clauses and the complexity of the issue, employers should consult with experienced legal counsel in reviewing existing clauses or adopting new ones.

G. Damages in Civil Lawsuits

An employee may file a civil wage and hour suit against an employer.[996] 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.[997] However, to recover lost wages the employee must prove that he or she suffered financial harm because of the employer's wage and hour violation since there is no provision in the Wage Act allowing recovery for nominal or emotional distress damages except possibly for retaliation claims.[998] Any emotional distress damages awards are not subject to statutory trebling.[999]

Under Massachusetts law, treble damages are mandatory for most wage and hour violations, and the employer is required to pay the plaintiff-employee *three times* the actual damages proven in any case in which liability is established.[1000] The treble damages statute applies to nonpayment of

[992] *See In re D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, at *2 (N.L.R.B. Jan. 3, 2012). The NLRB also did so in *In re Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *29 (N.L.R.B. Oct. 28, 2014).

[993] *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

[994] *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).

[995] *Epic Sys. Corp. v. Lewis* (U.S. 16-285); *Ernst & Young LLP v. Morris* (U.S. 16-300); *NLRB v. Murphy Oil USA, Inc.* (U.S. 16-307); *NLRB v. 24 Hour Fitness USA Inc.* (U.S. 16-689). On January 13, 2017, certiorari was granted in the first three cases.

[996] M.G.L. ch. 149, § 150.

[997] *Id.*

[998] *Travers v. Flight Servs. Sys., Inc.*, 808 F.3d 525, 551 (1st Cir. 2015).

[999] *Id. See also Somers* I, 2008 WL 497982, at *8 (declining to award such damages). In *Travers*, the First Circuit affirmed the award of emotional distress damages under M.G.L. ch. 149, § 150 in the context of a retaliation claim. The issue before the court was the *amount* of emotional distress damages and *whether those damages should be trebled*; the First Circuit did not address whether the statute provides for such damages in the first place. 808 F.3d 525.

[1000] M.G.L. ch. 149, § 150. Note that where the employer paid the owed wages belatedly, but before the filing of the court complaint, several courts have held that treble damages are not available on the wages themselves, but that the interest on the late payment is subject to trebling. *See, e.g., Dobin v. CIOview Corp.*, 16 Mass. L. Rptr. 785, 2003 WL 22454602 (Mass. Super. Ct. Oct. 29, 2003); *Clermont*, 102 F. Supp. 3d 353; *Littlefield v. Adcole Corp.*, 32 Mass. L. Rptr. 706, 2015 Mass. Super. LEXIS 83 (Mass. Super. Ct. June 18, 2015).

wages claims, Tip Statute violations, Independent Contractor Statute violations, improper expenditure of withholdings, improper deductions for tardiness or transportation services, minimum wage and overtime violations, failure to keep accurate payroll records, and taking wages through threats or force.[1001]

In 2012, the First Circuit upheld the constitutionality of the treble damages statute. In *Matamoros v. Starbucks Corporation*, the defendant argued that the mandatory nature of the treble damages provision violated due process principles.[1002] The First Circuit held that treble damages do not create the kind of due process concerns that are implicated by jury-awarded punitive damages, because the legislature had characterized those mandatory damages as "liquidated," which are not punitive. The court reasoned that, in other contexts such as the FLSA, liquidated damages have been found to act as a stand-in for interest and other incidental damages.[1003] The transforming of previously punitive treble damages to mandatory liquidated damages, the court concluded, was the legislative method of avoiding a constitutionality concern.[1004] The First Circuit's decision, however, addressed only federal due process principles, and did not address the viability of mandatory treble damages under the Massachusetts Constitution.[1005]

In addition to treble damages, the prevailing party in a wage and hour suit may recover litigation costs and reasonable attorneys' fees.[1006] While it is well established that courts may award these expenses, there has been significant litigation regarding what constitutes "reasonable" attorneys' fees.[1007] This determination is within the discretion of the trial judge, who may consider such factors as the attorneys' hourly rates, the thoroughness of the attorneys' documentation of hours worked, and whether the result justifies the costs.[1008]

It is an open question whether statutory interest pursuant to M.G.L. ch. 231§ 6B or § 6C is available when a prevailing plaintiff is awarded treble damages under the Wage Act. In *Travers*, the First Circuit described the issue as whether the legislature's adoption of mandatory treble damages in 2008, and its characterization of those damages as liquidated damages, acted as an

[1001] M.G.L. ch. 149, § 150.

[1002] *Matamoros*, 699 F.3d at 141.

[1003] *Id.* One Massachusetts trial court has used this same reasoning to deny an award of prejudgment interest to a plaintiff in a wage case. *See Feygina v. Hallmark Health Sys., Inc.*, 31 Mass. L. Rptr. 279 (Mass. Super. Ct. Aug. 5, 2013) (holding that plaintiff "would get an unfair windfall if she recovered both treble damages as liquidated damages and prejudgment interest" because both types of damages serve the same purpose).

[1004] *Travers*, at * 549.

[1005] *Matamoros*, 699 F.3d at 141.

[1006] *Id.*; *see Wiedmann*, 444 Mass. at 709 n.13.

[1007] M.G.L. ch. 149, § 150; *see, e.g., Killeen v. Westban Hotel Venture, LP*, 69 Mass. App. Ct., 784, 872 N.E.2d 731 (2007) (finding $153,717 award of attorneys' fees unreasonable where relationship between the fees and the results achieved was disproportionate because plaintiff recovered only $1.26 in actual damages).

[1008] *Killeen*, 69 Mass. App. Ct. 784.

implied repeal of the prejudgment interest statute with respect to cases under the Wage Act.[1009] It certified the question to the SJC, but the certification was withdrawn when the parties settled that case.[1010] In *George v. National Water Main Cleaning Company*, a federal district court certified a related question to the SJC: whether statutory interest pursuant to M.G.L. ch. 231, § 6B or § 6C is available when liquidated (treble) damages are awarded pursuant to M.G.L. ch. 149, § 150.[1011] As of the publication date, the question is pending.

[1009] *Travers*, 808 F.3d at 551. The question certified by the First Circuit was as follows: "Did Mass. Gen. Laws ch. 149, § 150 impliedly repeal Mass. Gen. Laws ch. 231, § 6B as to cases in which a party was awarded liquidated damages under § 150 and is eligible for prejudgment interest under § 6B, such that the award of prejudgment interest is precluded?" *Id.*

[1010] *Id.*; *Travers v. Flight Servs. Sys., Inc.*, No. 14-1745, 14-1756 (withdrawal order entered February 18, 2017).

[1011] *George*, 1:10-CV-10289 (D. Mass. Sept. 9, 2016).

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