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Introduction

Wage and hour collective and class actions strike fear into the hearts of employers, and for good reason. The last decade has seen a steady and alarming increase in the number of such lawsuits filed in federal and state courts throughout the country, many leading to large verdicts and settlements, some reaching many millions of dollars. While much focus, particularly in the media, has been placed on actions brought under the federal Fair Labor Standards Act (FLSA), in recent years it has become commonplace for lawsuits to be filed alleging violations of state wage and hour laws along with the FLSA or with other state statutory and common law claims.

Employers that operate in Massachusetts face substantial risks under the Commonwealth’s wage and hour laws. With a patchwork of arcane and difficult to apply 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 difficult to understand set of laws dating back to colonial days; a 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 recent amended statute that more narrowly constricts the use of independent contractors than under federal and other state laws.

Compounding the risks of non-compliance with these laws is the Commonwealth’s unique statute mandating treble damages for just about any Massachusetts wage and hour violation. This extraordinarily harsh law allows no defense to the trebling of damages after a liability finding, even where a violation was made in good faith, such as a decision to classify a group of employees as exempt consistent with industry practice, in accordance with Department of Labor guidance and court decisional law, or on the advice of counsel. When applied in the context of a class action, this treble damages statute may provide windfall recoveries to employees at catastrophic expense to employers.

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.

As you read this book, we welcome your thoughts and comments, especially where you find that we have not addressed in sufficient depth an issue of importance to your company or where our discussion of these complex laws may not be as clear as we intended or as complete.
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. 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 where the change is meant to be permanent and is not undertaken to evade overtime payments.

B. Sunday and Holiday Work

The laws in Massachusetts governing work on Sunday, commonly referred to as the “Blue Laws,” date back to the late 17th century. Although initially very restrictive, the Blue Laws now include many exceptions to the prohibition of Sunday work.

1. The Default Rule

The Blue Laws originated to restrict Sunday activities. Hence, the default rule imposed in Massachusetts pertaining to Sunday work 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” shall be in violation of the Blue Laws. Despite this sweeping prohibition, many businesses today are exempt from the Blue Laws and may legally operate on Sunday.

2. Exemptions

Massachusetts General Laws Chapter 136, Section 6, contains fifty-five exemptions from the Blue Laws. Businesses that fall into one of these exemptions may operate legally on Sunday. Some of the most commonly relied upon exemptions include:

- The operation of a retail store or shop
- The operation of a bank
- “Any manner of labor, business, or work not performed for material compensation”
- 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”
- Repairs to public roads and bridges, and the conduct of public services
- The operation of radio and television stations, and the preparation, printing, publication, sale, and delivery of newspapers
- Any public service that is necessary for the continuation of life, such as the operation of hospitals and clinics
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.

3. Permits for Necessary Sunday Work or Labor

If an employer does not qualify for an exemption, it may still obtain a single-day permit to operate on Sunday. 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. 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. The mayor or selectman of the target town or city sets the fee for the permit, which by statute must be ten dollars or less.

4. Legal Holidays

The Massachusetts legislature also extended the Sunday closure requirements to six statutory holidays: New Year’s Day, Memorial Day (last Monday in May), Independence Day, Labor Day (first Monday in September), Columbus Day (second Monday in October), and Veterans Day (November 11). If New Year’s Day, Independence 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. 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. A narrow exception applies to factory and mill employees, who may work on a holiday if their tasks are “absolutely necessary and can lawfully be performed on Sunday . . . ” To qualify as “absolutely necessary,” the work must “for technical reasons require continuous operation . . . .” Given this restrictive standard, manufacturing employees generally cannot be required to work on holidays.

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.

3. Permits for Necessary Sunday Work or Labor

If an employer does not qualify for an exemption, it may still obtain a single-day permit to operate on Sunday. 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. 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. The mayor or selectman of the target town or city sets the fee for the permit, which by statute must be ten dollars or less.
5. Employees Who Work in Retail Stores

The Blue Laws draw a distinction between retail and non-retail establishments and include unique requirements regarding premium pay and voluntariness of work that apply only to the former.18

a. Sunday Premium Pay

The premium pay requirement of the Massachusetts Blue Laws applies to only one of the fifty-five exemptions. Specifically, retail businesses that employ more than seven persons throughout the week, including the owner, must compensate employees who work on Sunday at no less than one and one-half times their regular rate of pay.19 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.20 Non-retail employers that operate on Sunday are not subject to the premium pay requirements.21

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.”22 As with premium pay, these provisions do not apply to non-retail employers operating on Sunday.23

c. Premium Pay and Voluntariness on Legal 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 statutory holidays listed above.24 As mentioned above, if New Year’s Day, Independence Day, or Christmas Day falls on a Sunday, the holiday is observed on the following Monday. For retail employers, this means that the premium pay and voluntariness requirements also apply to that Monday. 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.

Certain holidays have additional requirements unique to retail employers. Retail employers may only operate after 12 p.m. on Columbus Day and Veterans Day, unless statewide approval has been granted by the Massachusetts Department of Labor’s Division of Occupational Safety (DOS) and the retailer has obtained a local police permit.25 They may not open at all on Thanksgiving or Christmas without a permit from the Massachusetts Department of Labor, which will only issue such permits on a statewide basis for all retailers.26 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.

6. Permit for Work on Holidays

In addition to the requirements set forth above, retail employers must obtain a local police permit and approval by the DOS in order to operate on some holidays.27
The following charts—one applicable to retail establishments and the other to non-retail establishments—indicate on which holidays an employer must provide premium pay, whether an employer may require an employee to work, and whether an employer needs a permit to operate.28

### Retail Establishments – Holiday Requirements

<table>
<thead>
<tr>
<th>Holiday</th>
<th>Is Premium Pay Required?</th>
<th>Can Employer Require Employee to Work?</th>
<th>Is Permit Required for Operation?</th>
</tr>
</thead>
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<tr>
<td>Martin Luther King Day</td>
<td>Not Required (these holidays are not subject to M.G.L. ch. 136, § 5)</td>
<td>May Require Employee to Work</td>
<td>Not Required</td>
</tr>
<tr>
<td>Presidents Day</td>
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<td>Evacuation Day**</td>
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<td>Patriots Day**</td>
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<tr>
<td>Bunker Hill Day**</td>
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<tr>
<td>New Year’s Day</td>
<td>Required</td>
<td>May Not Require Employee to Work</td>
<td>Not Required</td>
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<tr>
<td>Memorial Day</td>
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<tr>
<td>Independence Day</td>
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<td>Labor Day</td>
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<tr>
<td>Columbus Day</td>
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<tr>
<td>Veterans Day after 12 p.m.</td>
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<tr>
<td>Thanksgiving Day</td>
<td>Required</td>
<td>May Not Require Employee to Work</td>
<td>Required</td>
</tr>
<tr>
<td>Christmas Day*</td>
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<td></td>
</tr>
<tr>
<td>Columbus Day before 12 p.m.</td>
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<tr>
<td>Veterans Day before 1 p.m.</td>
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*Retail stores may not open on Christmas Day if Christmas occurs on a Sunday.

**These holidays are observed only in Suffolk County.
Non-Retail Establishments – Holiday Requirements

<table>
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<tr>
<th>Holiday</th>
<th>Premium Pay Required</th>
<th>Employee Work Requirements</th>
<th>Permit Required for Operation</th>
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<td>New Year’s Day</td>
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<td>Patriots Day**</td>
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<td>Bunker Hill Day**</td>
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<td>Columbus Day after 12 p.m.</td>
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<td>Veterans Day after 1 p.m.</td>
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<td>Memorial Day</td>
<td>Not Required</td>
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<td>Independence Day</td>
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<td>Labor Day</td>
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<td>Veterans Day before 1 p.m.</td>
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<td>Thanksgiving Day</td>
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<td>Christmas Day</td>
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**These holidays are observed only in Suffolk County.

The DOS, which also assists in the administration of the Blue Laws, has informally taken the position that retail employers should pay employees premium rates for all work performed on Columbus Day and Veterans Day, even though the statutory restrictions do not apply to the full day. The courts have not provided any published guidance on this issue.

7. Penalties for Violation of Sunday and Holiday Work Laws

The Massachusetts Office of the 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. “Each unlawful act or sale” constitutes a separate offense.

In addition, employers that violate the rules regarding premium pay and voluntariness of work may be fined up to $1,000. Enforcement of these provisions is also entrusted to the Attorney General, and private parties have no standing to sue for alleged violations. Moreover, employees may not directly sue their employer for a violation of the Blue Laws.

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C. One Day of Rest in Seven

In addition to the Sunday work laws, two statutory provisions mandate a day of rest for employees. 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.1) give employees at least twenty-four consecutive hours of rest in every seven-day period. 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. Employees may not waive their day of rest and are prohibited from working on their designated day. Courts have provided little guidance as to which businesses constitute “manufacturing, mechanical, or mercantile” establishments, but one court has interpreted the “mechanical” category broadly, holding 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.”

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 worked. This statute applies to two groups: (1) employees “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) employees engaged “in the work of transportation or communication.” Unlike the One Day of Rest in Seven provision, employees may waive this right.

1. 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 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”

Types of work also covered are limited to the following:

- 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

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- Caring for machinery
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- 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"42

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.43

2. 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 $300.00.44

D. Compensable “Working Time”

Both Massachusetts and federal law require that employees be paid for all “working time.” Working time encompasses not only those hours spent by employees actively engaged in work, but also the time during which employees are required to be on the employer’s premises or in the service of the employer off-premises.45 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 employees receive an unpaid, thirty-minute meal break after six hours of work.46 The meal break is considered an employee’s free time, meaning the employee must be free to leave the workplace during that time.47 According to the Massachusetts Attorney General, employees must also be allowed to pray during meal breaks.48

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 $600.01.49

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 works50

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• Iron works
• Glass works
• Paper mills
• Letterpress establishments
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• Bleaching works
• Dyeing works50
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 . . . .”51

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. Thus, an employee has no right to sue the employer for a violation of that statute. However, where an employer does not properly compensate an employee for a missed meal break, the employee may take legal action for nonpayment of wages under Massachusetts General Laws Chapter 149, Section 148 (the Wage Act).52 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.53

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 systems can lead to nonpayment of wages claims when employers fail to make manual adjustments to account for the time actually worked. Employers therefore should typically confirm that any timekeeping system utilized allows employees to record all time actually worked.

The Attorney General has issued some guidance on the implementation of the meal break statute, stating that an employee may voluntarily agree to waive his or her meal break, but the employer must pay the employee for all hours worked.54 While the employee demonstrates 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.55

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.”56 While employers may
enforce mandatory rules requiring that meal breaks be taken at a specific time, they must pay employees when they work through them.  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. 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.

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 “are ‘the equivalent in money for the actual loss sustained by the wrong of another.’” This ruling, plaintiffs’ attorneys often argue, could give employees 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 that the employee cannot use the time freely, then the employee must be compensated. On-call staff 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. Employees must also pay on-call employees who are permitted to leave the premises if they must remain close to the work site that they cannot use the time effectively for their own purposes. 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 employee is free to leave but must carry a pager, leave word at home, or notify the employer where he or she can be reached, the on-call time is not compensable.

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. For the hours actually worked, the employee must be paid his or her regular rate. Employers that pay wages that exceed the minimum wage may opt to pay only minimum wage for any hours not actually worked. 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.
5. Compensable Travel Time

Massachusetts regulations generally conform to the federal regulations in defining the types of travel time that constitute compensable work time. 

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. 

The following are common examples of compensable travel time:

• 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. In addition, an employer is not required to provide reporting pay to an employee called in to perform work while on call because the employee is not “scheduled to work” a shift of three hours or more. 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. 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. If the shift exceeds twenty-four hours, the employer and employee may agree that up to eight hours of sleep time will be unpaid so long as the employer provides adequate sleeping arrangements and the employee can enjoy an uninterrupted night’s sleep. If those requirements are not met, all sleep time is compensable.

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b. Overnight Travel

When travel keeps an employee away from home overnight, only a certain portion of the time spent traveling 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.” 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. 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 normal working hours as a passenger on an airplane, train, boat, bus, or automobile.” Massachusetts regulations explicitly adopt the DOL’s position. 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. Employers are not obligated to pay employees for a regular meal period during overnight travel.

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.

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

2. **Court Appearances**

   a. **Massachusetts Jury Duty Leave**

   Massachusetts law prohibits the discharge of an employee for missing work due to service on a jury. 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. 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. 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. 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. Violation of this law constitutes contempt of court and may subject the employer to civil contempt penalties.

   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. 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. 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.

   b. **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. An employer that violates this rule will be punished by a fine of $200.00 or less or by imprisonment for one month or less, or both a fine and imprisonment. 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.

3. **Leave for Military Reserve Training**

Massachusetts law entitles employees who are members of organized units of the ready reserve of the armed forces of the United States as much as seventeen days of leave per calendar year to fulfill reserve military training requirements. An employee taking the leave must provide notice to his or her employer of the departure and return dates for the training and of the satisfactory completion of the training.
Following the leave, the employer must return the employee to his or her "previous, or a similar, position with the same status, pay, and seniority . . . ."108 The leave may be paid or unpaid, but must not affect the employee’s "vacation, sick leave, bonus, advancement," or other advantages of employment.101 If an employer fails to comply with the requirements of this statute, the aggrieved employee may bring an action for damages resulting from the non-compliance or for equitable relief.102

In addition to these state military leave obligations, employers must comply with the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which imposes additional 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.103

4. 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)104 and allows FMLA-eligible employees105 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"106

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].”107

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.108

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.109 Nothing in the SNLA requires employers to provide paid leave for situations other than those normally allowed.110

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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.111 If the need for leave was not foreseeable, the law permits employees to inform their employer as soon as practicable.112 Employers should notify employees of their ability to request leave under the SNLA by issuing a memorandum to each employee.113 Employers may require that requests for SNLA leave be supported by a certification.114

The SNLA authorizes the Massachusetts Attorney General to initiate a complaint or criminal action against an employer that violates the Act.115 Any employer convicted of a criminal violation of the Act will be subject to a fine of $500.00 or less.116 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.117

II. PAYMENT OF WAGES
Massachusetts General Laws Chapter 149, Section 148 governs the timing and frequency of wage payments in the Commonwealth and defines what constitutes wages.

A. Frequency and Timing of Payment
In general, Massachusetts employers must pay hourly employees on a weekly or biweekly basis.118 Employers that decide to switch from a weekly to biweekly pay period must provide employees with ninety days’ advance written notice of the change.119 Employers may pay exempt and non-exempt employees biweekly or semi-monthly, or at an employee’s option, monthly.120 In addition, employers may pay agricultural employees monthly.121

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.122 Thus, if a pay period ends on a Friday, employees must receive all wages earned during that pay period by the following Thursday.

B. Pay Upon Termination of Employment
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.123 In the absence of a regular pay day, the employer should pay the employee on the Saturday following termination.124 When an employer discharges an employee, it must pay the employee all wages owed on the day of termination.125 Because Massachusetts includes vacation pay in the definition of wages, accrued but unused vacation pay must be included in the final paycheck.126

C. Wages Under Massachusetts Law
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

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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, or discretionary bonuses. Additional details regarding severance, bonuses, and stock purchase plans are found in Sections II.B.3-5.

1. 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 such employee.” Courts consider commissions to be “definitely determined” if any contingency that must occur for the employee to receive the commissions has occurred and the amount due can be precisely ascertained. If the amount of total commissions is “arithmetically determinable,” dispute regarding the amount of deductions that should be made from the commissions will not prevent the commissions from being “definitely determinable.” 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.’”

2. 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. The 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. The Attorney General's interpretation of the Wage Act, as stated in that advisory, has been treated with deference and upheld by the Massachusetts Supreme Judicial Court (SJC).

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. If an employer terminates an employee, whether for cause or not, or if an employee resigns his or her employment voluntarily, the employer must pay the employee for all the time worked through the termination of employment, including any earned, unused vacation time payments. Employers and employees cannot contract around the requirement that an employee must be compensated for earned vacation upon termination. However, an employer may establish within the terms of employment “the amount of paid vacation the employee will receive and/or the specific time of the year when the employee can take vacation, depending on the needs and demands of the business.” The employer may also establish procedures for scheduling vacations. Employers will benefit from drafting unambiguous vacation pay policies because Massachusetts courts have resolved ambiguities in favor of employees. Employers may cap the amount of vacation time that an employee can accrue or earn. For example, an employer may state in its policy that after accruing a total of ten days of vacation, the employee will cease to earn additional vacation days until he or she has used some of the accumulated time. Thus, the employee would stop earning additional vacation time until his or her total accrued time drops below

a. Caps and “Use It or Lose It” Policies

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Act.147
designation of vacation time can be used to rebut a complaint of unpaid wages pursuant to the Wage
Act. 142 In addition, employers may enforce "use it or lose it" policies that require employees to use
all accumulated vacation time by a certain date or lose all or part of it. 143 "Use it or lose it" policies limit
the total amount of vacation time that an employee can accrue during the term of his or her employment.
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 employers fail to provide employees with adequate notice of their policy or with an
adequate opportunity to use the vacation time. 144

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." 145 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, the
employer is only required to pay the employee the unused hours designated as vacation. 146 Proof of
designation of vacation time can be used to rebut a complaint of unpaid wages pursuant to the Wage
Act. 147

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 each month, and that "other" time accrues at a
rate of one day per month.

Employers 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." 148 An employer may also include a probationary
period in its vacation policy, which stipulates that an employee will begin to accrue vacation time after a
set period of time, such as six months. Here again, the time frame should be clearly indicated.

d. Changes in Vacation Policies

Employers may amend the terms of their vacation policies, and any other condition of employment
affecting wages, at any time. 149 Any such amendment must be prospective in nature, and employees
must be given advance notice regarding the change. 150 New policies are more likely to be permissible if
employers give employees copies of changed policies in advance and require that each employee
acknowledge in writing his or her understanding of the changed policy. 151 If the new policy will result in a
forfeiture of accrued but unused vacation days, employees must be given a reasonable opportunity to use
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forfeiture of accrued but unused vacation days, employees must be given a reasonable opportunity to use
the time before it is forfeited.
3. **Severance Payments**

The Wage Act does not apply to severance payments. These payments are not referenced in the language of the statute, and Massachusetts courts have found that severance pay is not earned but is contingent upon termination. Thus, severance pay is not included in the definition of wages and is not subject to laws governing the payment of wages.152

4. **Bonuses**

4.1. **Discretionary Bonuses**

The Wage Act does not apply to discretionary bonuses. A bonus is “discretionary” if an employer is under no obligation to pay it.153 Courts generally look to the language of the agreement or policy providing for the bonus to determine whether it is discretionary.154

4.2. **Earned Bonuses**

Courts have found that bonuses constitute wages where 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.155 Bonuses that constitute wages typically bear strong similarities to commissions.

5. **Stock**

Massachusetts law explicitly excludes employee stock purchase plans from the definition of wages.156 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.157 Additionally, unvested stock, awarded as part of an employee bonus plan, does not constitute wages because unvested stock only becomes valuable when it vests, making it contingent upon further employment and therefore not yet earned by the employee.158

### D. How Wages Must 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.159 In 1980, the SJC opined on this outdated rule, holding that where the state 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.160

#### 2. Direct Deposit

An increasing number of employees are paid through direct deposit. The Massachusetts Office of the 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.161

The Office of the Commissioner finds this decision conforms with federal regulations holding that “[no] 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. 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.”

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.

III. DEDUCTIONS FROM 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.

A. Deductions

1. Mandatory Deductions

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

(a) state and federal income tax withholdings; and

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

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.

2. Deductions for Lodging

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

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

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.171

4. Deductions for Uniforms

The Code of Massachusetts Regulations provides that an employer 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.172 The regulations define “uniform” as any “special wearing apparel which is worn by an employee as a condition of employment.”173 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.174 The regulations further provide that “where an employer requires a general type of basic street 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.”175

If uniforms require dry cleaning, commercial laundering, or other special treatment, the employer must reimburse employees for the actual costs of the services to the extent that these costs reduce their hourly rate below the basic minimum wage.176 Where 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.177

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5. Deductions and the Calculation of Overtime

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

6. Deductions for Lateness

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.

7. 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.

B. 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. 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.

IV. 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. 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. Employers holding unclaimed wages must:

1. send a notice by first class mail to the last known address of the employee;
2. report to the Treasurer and Receiver General of Massachusetts using the Treasurer's prescribed form; 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.

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V. 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). The minimum wage rates established by these statutes and the circumstances under which they apply differ. An employer must apply whichever law provides a greater degree of protection for the employee.

A. The Minimum Wage Rate in Massachusetts

With certain limited exceptions, as of January 1, 2008, all Massachusetts employees must be paid a minimum wage of $8.00 for each hour worked. 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. In fact, Massachusetts law provides that the Commonwealth’s minimum wage will always exceed the federal minimum by at least $0.10 per hour.

1. Coverage Under the Massachusetts Minimum Wage Law

In Massachusetts, the minimum wage law covers any person working in an “occupation.” 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.” As discussed below, “occupation” is defined to specifically exclude certain types of work. The Massachusetts minimum wage law applies to private employers of all sizes. This statute does not include state or municipal employees—those employees are covered by the FLSA.

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. 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.” For purposes of the FLSA, “employ” means “to suffer or permit to work.” 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 State 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. 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.

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Both Massachusetts law and the FLSA exclude “volunteers” and “trainees” 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 to concerns about exploitation, 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 V.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. 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.

1. Volunteers

There is very little statutory or judicial guidance under either Massachusetts or federal law regarding when an individual may be considered an exempt 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.

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

In applying this test, courts tend to focus on the benefit conferred on the organization by the worker. If the organization relies too heavily on its “volunteers,” courts are likely to find that the individuals’ services are not exempt.

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are for the benefit of the employer and deem the individuals to be employees. 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.

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. The FLSA does not define what constitutes a “nominal fee,” but regulations specify that such payments must not be substitutes for compensation or linked to productivity. 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.

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.

2. **Trainees**

   a. **Massachusetts Exemption for Trainees**

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.” Determining whether an individual is a trainee under Massachusetts law is a two-step process.

First, the program must be charitable, educational, or religious in nature. “Charitable” programs are those that have registered as charities with the Massachusetts Attorney General’s Public Charities Division. “Educational” programs make training an integral part of their educational curricula and provide supervision and possibly academic credit to students. Massachusetts has yet to define “religious” programs for the purposes of this statute.

Second, the program in question must qualify as a “training program” such that it falls outside the scope of the state 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” and therefore not an employee covered by the FLSA:

1. The training is similar to that which would be given at a vocational school or academic institution.
2. The training is for the benefit of the trainees or students.
3. The trainees or students do not displace regular employees, but work under their close observation.
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4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion its operations may actually be impeded by the activities.
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.

6. The employer and the trainees or students understand the trainees or students are not entitled to wages for the time spent in training.219

The DOS 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.”220 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 education221
- 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 supervised222
- 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 member223
- 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 DOS narrowly granted trainee status because the program was “genuinely designed to ready the students for the workplace”)224

b. Federal Exemption for Trainees

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. Although at least one court has followed the Massachusetts approach and applied a “totality of the circumstances” test,216 the position of the DOL is that all six elements must be present for a worker to qualify as a trainee.225 Federal courts have found trainee status under the FLSA where workers disclaim an employment relationship, obtain legitimate training, and do not displace regular employees.226 Trainee status most often exists where the trainee is a student receiving educational credit as well as practical experience related to his or her course of study.227 If the worker does not receive an educational benefit or another obvious advantage, courts will ask whether the business benefits from the arrangement more than the trainee does.228 Some authorities have noted that true trainees will often impede a business’s operations.229 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 a “trainee.”230 Because federal law is stricter, an individual may qualify as a trainee—and thus the minimum wage exemption—under state but not federal law.

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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 $30.00 per month in tips may be paid a “service rate” of $2.63 per hour.\(^{232}\) This service rate is discussed further in Tips and Service Charges, Section VIII.E.

2. Student Workers

Under certain circumstances, student workers may receive as little as 80 percent of the state minimum wage of $8.00 per hour ($6.40 per hour). In order to pay this sub-minimum wage, an employer must first obtain a license from the Massachusetts Department of Labor and Workforce Development.\(^{233}\) 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
- A student enrolled in a school, college, university, or bona fide educational institution, who is also employed by that institution
- A student working at a summer camp as either a counselor or a counselor trainee, who is also involved in camp programming and camper supervision
- 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
- A person enrolled in an accredited vocational or technical school, regardless of whether he or she is pursuing a bachelor’s degree\(^{235}\)

Federal law also allows the payment of special sub-minimum wages to certain student workers.\(^{236}\) Student workers who fall into the narrow categories listed above also are likely to satisfy the federal requirements.\(^{237}\)

3. Workers With Disabilities

Both Massachusetts and federal law allow employers to pay a special sub-minimum wage to certain workers with disabilities.\(^{238}\) In order to pay the special sub-minimum wage, an employer must first obtain certificates from the Massachusetts Commissioner of Health and Human Services\(^{239}\) and the Administrator of the DOL’s Wage and Hour Division.\(^{240}\)

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 . . .”.\(^{241}\) 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.242 Such disabilities may include blindness, mental illness, mental retardation, cerebral palsy, or substance abuse.243 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.244 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.245

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Volunteers | Same as federal law | Must satisfy six-factor test: |
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### D. The Prevailing Wage for Work on Public Contracts

Both the Massachusetts and federal government set special “prevailing” wage rates for employees working on public works contracts. These wage rates always exceed the minimum wage. Under both state and federal law, employees earning a prevailing wage are entitled to overtime compensation for any hours worked in excess of forty hours per week.

The Massachusetts Prevailing Wage Statute requires that employees of contractors and subcontractors on state-funded public works projects, except those who perform strictly supervisory functions, be paid a prevailing wage set by the DOS. Employees covered by the Massachusetts prevailing wage laws include those working on the construction of public works and those who operate trucks or other vehicles on non-construction public works projects. The state sets a distinct prevailing wage rate for each project and therefore employers must contact the DOS before a public works project begins to inquire as to the applicable rate. Under Massachusetts law, the prevailing wage rate includes the value of fringe benefits typically provided in a given geographic area. Employers choosing to provide these fringe benefits may then take a credit for the value of these benefits against the prevailing wage rate. Massachusetts law defines “fringe benefits” to include only an “employer’s contributions to health/welfare, medical, and retirement plans.”

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pension, annuity or supplemental unemployment insurance plans” and not the value of vacation or sick leave. Covered employers must post the prevailing wage rates in a conspicuous location at the work site. The federal prevailing wage rate is governed by the Davis-Bacon and Related Acts (DBRA). The DBRA 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. The prevailing wage rates and fringe benefit rates for these projects are determined by the Wage and Hour Division of the DBRA. Employers subject to the DBRA must post the scale of wages in a prominent and easily accessible place at the work site.

VI. 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 week. Federal overtime requirements are contained in the FLSA. 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. Massachusetts employers must apply whichever law provides the greatest protection for their employees.

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). 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 VII.

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.” 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. 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.

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
- On-call pay
- Longevity pay (i.e., extra pay for seniority)
- Payments for "sold back" benefits, such as vacation or sick 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)
- Earned work credit for employees who did not get at least two consecutive days off
- 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
- A lump sum paid for work performed during overtime hours without regard to the number of hours worked

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
- Reasonable uniform allowances

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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 Massachusetts regulations provide that the regular hourly rate shall exclude sums paid as:

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

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 VII.

- 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 $8.00 per hour. The employee's overtime rate is $12.00 per hour (1.5 x $8.00 regular rate = $12.00 per hour). If the employee works 50 hours in a week, the employee would be paid $440.00 for the week – $320.00 regular pay ($8.00 x 40 hours), plus $120.00 overtime pay ($12.00 x 10 hours).

6. **Calculation of the Regular Rate for an Employee Paid a Fixed Salary**

Where a non-exempt employee is paid a fixed salary for a particular number of hours worked in a week, the employee's regular rate is generally determined by dividing the employee's salary by the number of hours for which the salary is intended to compensate the employee. Salaried employees are entitled to overtime compensation only for hours worked over forty in any given workweek.

Example: An employee is paid a salary of $350.00 per week and is expected to work 35 hours per week. The employee's regular rate of pay is $10.00 per hour ($350.00 ÷ 35 hours = $10.00 per hour). If the employee works 45 hours in a particular workweek, the employee would be paid $475.00 for the week – $350.00 regular fixed salary, plus $50.00 ($10.00 per hour for hours 36 through 40), plus $75.00 overtime pay ($15.00 per hour for hours 41 through 45).

7. **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 DOS (the entity that administers the Massachusetts overtime law) addressed this issue in a 2003 opinion letter. Under the guidance of that opinion letter, commission-only employees must receive total compensation for each work week 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. 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.

8. **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. 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. 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.

Where 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. If the bonus earnings cannot be identified with particular workweeks, the employer can use an 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).

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 4 weeks of that month. The bonus would be allocated to each of the 4 weeks by dividing the $1,000 bonus by 4 (corresponding to the 4 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 ($10.00 x 50 hours = $500.00). The bonus allocable to the week is added to the employee’s regular hourly compensation ($250.00 + $500.00 = $750.00). That total is then divided by the total number of hours worked to obtain an adjusted hourly rate ($750.00 ÷ 50 hours = $15.00 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 4 weeks in the bonus period ($15.00 x .5 x 10 = $75.00). The employee’s total compensation for each week would be $825.00 ($500.00 regular hourly compensation, plus $250.00 bonus, plus $75.00 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 ($10.00 x 40 hours = $400.00), 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 ($10.00 hour x 1.5 x 10 hours = $150.00). 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 worked to obtain the employee’s straight-time pay and overtime as it ordinarily would be ($10.00 x 40 hours = $400.00), 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 ($10.00 hour x 1.5 x 10 hours = $150.00). 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 worked.
9. 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.\(^{276}\)

\[
\text{Regular Rate} = \frac{\text{Total Earnings}}{\text{Total Hours Worked}}
\]

Example Method 1: An employee's straight-time workweek is 40 hours. The employee works 45 hours and receives total earnings of $450.00. The employee's regular rate is $10.00 per hour ($450.00 ÷ 45 hours = $10.00 per hour). Thus, for the 5 overtime hours worked, the employee is entitled to an additional $25.00 dollars (.5 x $10.00 per hour x 5 hours = $25.00). The employee's weekly wage is $475.00.

Example Method 2: An employee who regularly receives $5.00 per piece of completed work would be entitled to $7.50 per piece of work finished during the overtime hours (1.5 x $5.00 per piece = $7.50 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.\(^{278}\)

The employee must then be paid one-half of the regular rate for all hours worked over forty in the workweek.\(^{279}\)

Example: An employee for a housekeeping service company is compensated based on a job rate of $50.00 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, $450.00 ($50.00 per house x 9 houses = $450.00), by the total number of hours worked, in this case, 45 hours. Thus, the employee's regular rate would be $10.00 per hour ($450.00 ÷ 45 hours = $10.00 per hour).

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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.\(^{277}\)

Example Method 1: An employee's straight-time workweek is 40 hours. The employee works 45 hours and receives total earnings of $450.00. The employee's regular rate is $10.00 per hour ($450.00 ÷ 45 hours = $10.00 per hour). Thus, for the 5 overtime hours worked, the employee is entitled to an additional $25.00 dollars (.5 x $10.00 per hour x 5 hours = $25.00). The employee's weekly wage is $475.00.

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c. Semi-Monthly or Monthly Salary

Under the FLSA, non-exempt employees may be paid a semi-monthly or monthly salary. Massachusetts law, however, requires that non-exempt employees be paid more frequently—weekly or biweekly. Hence, the semi-monthly or monthly methods discussed here apply to Massachusetts employees only if they are exempt under state law.

An employee’s regular rate of pay is based on pay for a workweek. 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). 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). To determine the employee’s regular rate, an employer must then divide the weekly salary by the number of hours in a regular workweek.

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 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 $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).
10. Calculation of the Regular Rate Using the Fluctuating Workweek Method

Under both Massachusetts and federal law, employers may pay a non-exempt employee a fixed salary intended to cover all hours worked each workweek regardless of the number of hours the employee actually works, provided that the following conditions are satisfied:

- 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 employee’s workweek 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).
- The salary is sufficient to provide more than the minimum wage for each hour worked.

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. The regular rate is determined by dividing the number of hours worked in the workweek into the amount of the weekly salary to obtain the applicable hourly rate for that week. The employee is then entitled to overtime compensation in the amount of one-half times this rate for all hours worked over forty hours per week. Under a fluctuating workweek method, the more hours worked, the lower the overtime rate will be.

Example 1: An employee is paid $600.00 per week and works 50 hours. The employee’s regular rate is $12.00, which is calculated by dividing the $600.00 weekly salary by the total number of hours worked ($600.00 ÷ 50 = $12.00 per hour). The employee would be entitled to $60.00 of overtime pay ($12.00 x 10 overtime hours), or $6.00 per each hour of overtime.

Example 2: An employee is paid $600.00 per week and works 60 hours. The employee’s regular rate is $10.00, which is calculated by dividing the $600.00 weekly salary by the total number of hours worked ($600.00 ÷ 60 = $10.00 per hour). The employee would be entitled to $100.00 of overtime pay ($10.00 x 20 overtime hours), or $5.00 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 employers 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. In addition, employers should be cognizant that this method of compensation is administratively complex and potentially burdensome. Given the complexities, employers should seek the advice of legal counsel prior to implementing a fluctuating workweek method for overtime compensation.
VII. 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. 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, and Massachusetts courts and the DOS 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 state law.
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 employee." The FLSA includes some exemptions to the overtime laws that are outside of this publication’s Massachusetts law focus.

### 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. 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, 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.

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; and
3. perform certain exempt duties.

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

To qualify for the executive, administrative, or professional exemption, employees generally must be paid at least $455.00 per week ($23,660 per year) on a “salary basis.” These requirements do not apply to outside sales employees, teachers, certain computer professionals, or employees practicing law or medicine.
If an employee makes less than $455.00 per week, the employee generally cannot qualify as exempt even if he or she meets the other requirements for the white collar exemptions. If the employee makes $455.00 or more per week, 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.

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."302 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.303 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.304

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.305 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.306 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.307

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.308 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.309 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.310 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.311

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

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(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. Unpaid disciplinary suspensions are appropriate only where imposed pursuant to a written policy applicable to all employees. 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. Importantly, any unpaid disciplinary suspension must be made in full-day increments; deductions for partial-day suspensions are not permitted pursuant to this exception. Employers may also make deductions from an employee's pay as a penalty for violating safety rules of major significance. 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.

(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. An employer may not deduct any amount from an exempt employee's pay when the employee is absent only part of a day. 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.

(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. An 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. Further, an 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.

(4) Deductions Taken Pursuant to the Family and Medical 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. Thus, an 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." The employer is only obligated to pay a proportionate part of the employee's full salary for the time actually worked. For example, if an employee 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 state 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. 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
(5) Deductions From Vacation or Leave Banks

There is a significant 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. 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. Similarly, deductions from leave banks in less than full-day increments are permissible, whereas partial-day deductions from salary are not permitted. 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.

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 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. Such adjustments must be relatively infrequent and remain in effect for a substantial period of time. 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. 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. Any employer that suspects that it has violated the salary basis test should contact legal counsel to discuss its exposure and potential remedies.

b. Violations of the Salary Basis Test

As explained above in Section VII.A.2.a, if an employer makes improper deductions from an employee’s predetermined salary, the employee will no longer be considered to be paid on a salary basis and will no longer be exempt. In addition, an employer’s practices, even as applied to a small number of exempt employees, may in certain circumstances compromise the exempt status of other employees similarly situated to that employee.

An employer may violate the salary basis test even in the absence of actual deductions if its employees are subject to impermissible deductions in pay “as a practical matter.” This will be the case where the employer’s policy creates a “significant likelihood” that employees may actually face such deductions.

While actual deductions are unnecessary, “in their absence [there must be] a clear and particularized policy—one which ‘effectively communicates’ that deductions will be made in specified circumstances.” A policy allowing impermissible deductions poses a significant risk to an employer because such policies may apply to all or many of the employer’s exempt employees.

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 XVI.E.

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. 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. 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. Any employer that suspects that it has violated the salary basis test should contact legal counsel to discuss its exposure and potential remedies.

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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 executive, administrative, or professional employee. The Massachusetts Minimum Wage regulations (discussed in Section V) explicitly adopt the federal definitions of bona fide executive, administrative, and professional employees, including the duties tests for each of the white collar exemptions.

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 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.

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
employees engaged in work on a related project or specialty within a larger department.\textsuperscript{353} 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.\textsuperscript{354} 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.\textsuperscript{355} For 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.\textsuperscript{356} 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.”\textsuperscript{357} In addition, hours

(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.”\textsuperscript{349} 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.\textsuperscript{350} Likewise, where an enterprise has more than one establishment, each establishment may qualify as a recognized subdivision.\textsuperscript{351} Under certain circumstances, employees working a particular shift can constitute a department or subdivision,\textsuperscript{352} as can groupings or teams of employees engaged in work on a related project or specialty within a larger department.\textsuperscript{353} A case-by-case analysis is required to determine whether particular groupings or teams qualify as departments or subdivisions.

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- 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

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.” 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. Likewise, where an enterprise has more than one establishment, each establishment may qualify as a recognized subdivision. Under certain circumstances, employees working a particular shift can constitute a department or subdivision, as can groupings or teams of employees engaged in work on a related project or specialty within a larger department. A case-by-case analysis is required to determine whether particular groupings or teams qualify as departments or subdivisions.
(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. 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.

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. 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.

(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 “customarily and regularly” direct the work of at least two other full-time employees. 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. However, employees with some supervisory responsibilities whose primary duties are the same as those of subordinates are unlikely to qualify as exempt executives. 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. 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. 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. An employee whose primary duty is ordinary production work or routine, recurrent, or repetitive tasks cannot qualify for the executive exemption.

(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. 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.

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. 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.

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

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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. 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.

Many courts have also determined that an employee’s primary duty is management despite the fact that the employee concurrently performs non-exempt duties. For example, the First Circuit held that assistant managers in forty-four Burger King fast food restaurants were exempt executives even though they performed 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.” The court found that these employees were truly “in charge” of the restaurants during their shifts and therefore met the primary duty test for the exemption. Similarly, 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 performed management functions, such as hiring, firing, and supervising other employees; dealing with vendors; and ensuring proper accounting of inventory and cash.

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 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. 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.

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. 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.

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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.379

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

(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.380 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.381 Non-manual or office work considered to be directly related to management or general business operations include but are not limited to work in functional areas such as:

- Tax
- Finance
- Accounting
- Budgeting
- Auditing
- Insurance
- Quality control
- Purchasing
- Procurement
- Advertising
- Marketing
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.” 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.\(^{384}\)

In assessing whether an employee meets the requirements of the administrative exemption, courts sometimes look to what is called the “administrative-production dichotomy.”\(^{385}\) 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.\(^{386}\) An employee whose main job function is generating the employer’s product will typically not qualify for the administrative exemption.\(^{387}\)

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.\(^{388}\) 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.\(^{389}\) 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.\(^{390}\)

(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.\(^{391}\) 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.\(^{392}\) The
regulations specify that determining whether an employee meets this requirement is fact-specific and must be examined on a case-by-case basis. 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
- 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

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

In general, an employee who exercises discretion and independent judgment has the authority to make independent choices without immediate direction or supervision. 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.

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.

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An employee 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.\textsuperscript{403} 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.\textsuperscript{403} 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.\textsuperscript{404} 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.\textsuperscript{405} 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.\textsuperscript{406}

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.\textsuperscript{51} 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.\textsuperscript{52} 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.\textsuperscript{403} 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.\textsuperscript{405} 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.\textsuperscript{406}

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 regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.\textsuperscript{407}

- 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).\textsuperscript{408}

- 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

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improvements

• 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

• A buyer who evaluates reports on competitor prices in order to set the employer’s prices

(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

• 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 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

• 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

(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 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.417

(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.418 The discretion required to meet the professional exemption is a “lesser standard” than the discretion required under the administrative exemption.419 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.420 For purposes of the exemption, advanced knowledge cannot be attained at the high school level.421

(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)422

(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.423 The best evidence that an employee meets this requirement is the possession of the appropriate academic degree.424 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. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

(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
- 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
- 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

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- Medical interns and residents who hold the requisite academic degree for the general practice of medicine
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
- Veterans who received extensive training in a technical field not customarily recognized as requiring an advanced degree
- Most airline pilots
- Case managers at drug treatment centers when their position only requires a general academic education

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.

Work Requiring Invention, Imagination, Originality, or Talent

To qualify for the creative professional exemption, an employee’s primary duty must be the performance of work requiring invention, imagination, originality, or talent as opposed to routine mental, manual, mechanical, or physical work. The requirement of invention, imagination, originality, or talent is what distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. 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. The requirements are generally met by the following individuals:
• Actors
• Musicians
• Composers
• Conductors
• Soloists
• Certain painters
• Writers
• Cartoonists
• Essayists
• Novelists
• Persons holding positions with primary responsibility for writing in advertising agencies

(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.

(3) Computer Professionals Exemption

The FLSA exempts computer professionals from mandatory overtime compensation. Massachusetts has not specifically adopted this exemption, and it is unclear whether it applies to Massachusetts employees. Some computer employees who qualify for the computer professionals exemption may also be exempt pursuant to the administrative or executive exemptions. 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.

To qualify for the computer professionals 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; or
- a combination of the aforementioned duties, the performance of which requires the same level of skills.

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. Instead, courts look to whether the employee's primary job duty falls within the criteria specified by the regulation.

The computer professionals exemption does not include employees whose primary duty is the manufacture or repair of computer hardware and related equipment. 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.

Finally, mere maintenance and installation of computer systems will not meet the standards for exemption.

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. Under this exemption, employees are exempt from overtime if:

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

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. Thus, a highly compensated employee will qualify for this exemption if the employee customarily and regularly

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performs one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.\textsuperscript{451} 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.\textsuperscript{452}

The exemption for highly compensated employees applies only to employees whose primary duty includes performing office or non-manual work.\textsuperscript{453} 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, longshoremen, and construction workers) are not exempt under this statute even if they satisfy the high salary threshold.\textsuperscript{454}

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 before withholding overtime pay.

a. Federal Outside Sales Exemption

The FLSA exempts outside sales employees from both its overtime and minimum wage requirements.\textsuperscript{455} 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;\textsuperscript{456} and (2) the employee must be customarily and regularly engaged away from the employer’s place or places of business.\textsuperscript{457}

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.\textsuperscript{458} “Obtaining orders for services or for the use of facilities” includes but is not limited to selling radio or television air time, soliciting advertisements for publications, and soliciting railroad freight.\textsuperscript{459}

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 a fixed location, such as at the employee’s home, if the employee conducts sales activities there.\textsuperscript{460} 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.\textsuperscript{461}

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
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.” 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. While the statute does not define “daily reports” and there is no case law on this topic, a DOS opinion letter addressing this issue states that the daily reports must be in-person (and not merely electronic) in order to destroy an employee’s exempt status. 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.

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.” 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.

2. Federal Commissioned Inside Sales Exemption

Under the FLSA, certain retail and service employees who work on commission are exempt from federal overtime requirements. 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.

occasionally, but this does not mean that those activities must be performed more than once a week or even every week. 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. 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. Unlike the white collar exemptions, there is no salary basis requirement for outside salespersons under the FLSA.
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, 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. 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 natural fluctuation in the employee’s commission earnings over time. 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. The employer is required to document its reasons for choosing that representative period in its records.

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. 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. Massachusetts also has a second exemption that applies to common carriers of passengers by motor vehicle, which is discussed in more detail below.

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. 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.

Under the FLSA, “drivers” are those who operate motor vehicles in the course of interstate or foreign commerce. 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.” “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. An employee who loads trucks but does not ride on them does not qualify as a helper. 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.” Loaders may also be involved with unloading and transferring freight, so long as they are primarily responsible for safely loading trucks. “Mechanics” are defined as those employees who keep vehicles in safe working condition.

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 seem minor.

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The federal MCA exemption also requires that goods be moved in interstate commerce. 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. 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.

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. That is, a 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. Aside from this difference, the Massachusetts exemption closely tracks the federal, and the DOS has stated that the two exemptions are otherwise identical. 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.

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. This additional exemption covers common carriers operating some passenger vehicles, including public transportation, school vehicles, charters, and other for-hire passenger vehicles.

4. Seasonal Exemptions

The FLSA contains one exemption that is applicable to seasonal establishments, while Massachusetts law contains two exemptions that may apply to such businesses. The requirements of the federal and state exemptions overlap but are not identical. 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. To qualify, the establishment must be both recreational and seasonal. An amusement or recreational facility is one that the public frequents for its amusement or recreation. Whether a business meets this criteria depends on the

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employer's principal activities and not on the nature of the work performed by the employee. 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. 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. 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. 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 exemption unless it independently meets all the criteria for the seasonal exemption. Once a business qualifies for the exemption, an employee performing routine work that is incident to its operation is exempt for the entire year. Once a business qualifies for the exemption, an employee performing routine work that is incident to its operation is exempt for the entire year.

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. 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. 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. 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.

5. Blanket Exemptions for Certain Businesses

Massachusetts overtime law provides blanket exemptions for employees of certain types of businesses. 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 overtime wages to their employees. The Massachusetts blanket exemptions apply to employees working in:

- Hotels, motels, motor courts, or similar establishments
- Restaurants
- Hospitals, sanatoriums, convalescent or nursing homes, rest homes, or charitable homes for the aged
- Gas stations
- Non-profit schools or colleges
- Summer camps operated by non-profit charitable corporations

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- Non-profit schools or colleges
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6. Other Massachusetts Exemptions

Massachusetts law also provides the following less commonly applied exemptions:

- Garagemen
- 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

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.

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.

A. Changes to the Massachusetts Tip Statute

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. The state legislature modified the statute several times after its enactment—in 1966 imposing fines for violations of the law, in 1980 expanding the statute's coverage beyond tips to include fees labeled as “service charges” (a term which the statute failed to define), 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. 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. 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 XVI.E) will likely
prompt 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.

B. 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.524 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.525 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.526

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.”527 Tips include cash and amounts designated on credit card receipts, with no distinction made between the two under the statute.528 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.”529

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 which patrons explicitly leave for or give directly to employees who are not wait staff employees, service employees, or service bartenders.530 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 the fee to be charged in lieu of or in addition to a tip or gratuity for employees covered by the statute.531 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 of law where no customer would reasonably believe that they were distributed to protected employees.532

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.533

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].”534 What action sufficiently conveys this distinction to a patron has not been settled in the courts. Thus far, only one court has issued a decision specifically addressing the issue under the current version of the Tip Statute.
designated a fee as a house or administrative fee, the section does not require the employer to provide a written description that a fee is not a tip or service charge.” Thus, simply indicating that a fee is a house fee or an administrative fee could be sufficient to distinguish it from a service charge. However, since no appellate court has ruled on this issue, employers are wise to include written descriptions of all such fees on invoices to reduce the threat of litigation.

C. 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,” the law as amended in 2004 has established three categories of employees who are eligible to share in tips and service charges:

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

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, sporting events, and audiovisual technician services.

The amended language is problematic since 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.” 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.” The statute, however, narrows the “service employee” category to exclude staff who help provide direct service to customers if they also perform “managerial responsibilities.” Because the statute fails 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 Massachusetts Attorney General’s Office has indicated that it will “look to” the federal definition of “executive” in interpreting the Tip Statute, stating that “these factors may be relevant

Statute. In Bednark v. Catania Hospitality Group, Inc., the court held that “where an employer has designated a fee as a house or administrative fee, the section does not require the employer to provide a written description that a fee is not a tip or service charge.” Thus, simply indicating that a fee is a house fee or an administrative fee could be sufficient to distinguish it from a service charge. However, since no appellate court has ruled on this issue, employers are wise to include written descriptions of all such fees on invoices to reduce the threat of litigation.

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In an advisory notice, the Massachusetts Attorney General’s Office 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. 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. It remains unclear, however, whether the federal definition is compatible with the Commonwealth’s Tip Statute, and the Attorney General’s advisory merely states that it “may be relevant.”

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 Murray 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. 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.” 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. 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 preclude them from the tip sharing.” In contrast, yet citing to the Murray 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.”

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 should also 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.

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.” Thus, employers may require tip-pooling among a group of employees or mandate that employees share tips with other eligible employees. At least one court has interpreted the Tip Statute as prohibiting employers from ever permitting employees to create an unlawful tip-pooling system.

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].” As a practical matter, tips are usually cashed out daily, while proceeds from service charges are typically included in employees’ 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.554 Under state law, an employer may elect to pay a rate as low as $2.63 per hour—known as the “service rate.”555

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 the proper notice.556 To qualify as a “tipped employee,” one must customarily receive tips of more than $30.00 per month.557 On a weekly basis, the combination of tips and the service rate earned by the employee must meet or exceed the state minimum wage, currently set at $8.00 per hour.558 The tipped employee may receive tips directly or through a valid tip pool.559 Massachusetts also stipulates that employers that pay less than minimum wage to tipped employees must inform those employees of the applicable law and must make clear to them that the employer will be paying the lower rate.560 While no authority requires that employees receive written notice, this method obviously provides the employer with the best evidence in the event of a dispute. An employer must always pay at least $2.63 in hourly wages to a tipped employee, even if the employee’s tips alone exceed the state’s minimum wage of $8.00 per hour.561

F. Liability for Violations

Both companies and individuals may be liable for violations of the Tip Statute.562 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.”563 Thus, the statute allows for individual liability for those having “management responsibility but no ownership stake in an enterprise.”564

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.565 In DiFiore v. American Airlines, Inc., American contracted with a vendor (G2 Secure Staff) to provide the airline with skycap personnel.566 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.”567 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.568

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.569 Moreover, as discussed in depth in Section XVI.E, employers that are found liable for violating the Tip Statute must pay the plaintiff-employee three times the actual damages proven in the case.570 In addition to treble damages, the prevailing party in a Tip Statute suit may recover litigation costs and reasonable attorneys’ fees.571

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.554 Under state law, an employer may elect to pay a rate as low as $2.63 per hour—known as the “service rate.”555

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 the proper notice.556 To qualify as a “tipped employee,” one must customarily receive tips of more than $30.00 per month.557 On a weekly basis, the combination of tips and the service rate earned by the employee must meet or exceed the state minimum wage, currently set at $8.00 per hour.558 The tipped employee may receive tips directly or through a valid tip pool.559 Massachusetts also stipulates that employers that pay less than minimum wage to tipped employees must inform those employees of the applicable law and must make clear to them that the employer will be paying the lower rate.560 While no authority requires that employees receive written notice, this method obviously provides the employer with the best evidence in the event of a dispute. An employer must always pay at least $2.63 in hourly wages to a tipped employee, even if the employee’s tips alone exceed the state’s minimum wage of $8.00 per hour.561

F. Liability for Violations

Both companies and individuals may be liable for violations of the Tip Statute.562 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.”563 Thus, the statute allows for individual liability for those having “management responsibility but no ownership stake in an enterprise.”564

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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.572

A. General Wage and Hour Notices

Employers must display a poster setting out the Massachusetts wage and hour requirements in a conspicuous location, and they must provide free copies of the poster to employees upon request.573 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 $8.00 per hour for most employees), and must summarize the Commonwealth’s laws regarding the payment of wages, tips, meal breaks, travel time, reporting pay, child labor, overtime, retaliation, the SNLA, inspection of payroll records, and the employee’s right to sue.574 It must also list several Fair Labor hotlines for wage and hour complaints.575

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.576 If an employer operates its business on a Sunday, it must first post a list of employees who will work that day.577 The list must specify which alternate day of rest those employees will receive, and it must be on display in a conspicuous location.578 Employers may not require or allow employees to work on those designated days of rest.579

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.580 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.581 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.582

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.583 This group includes those whose “productive capacity” is impaired by physical or mental disability, age, or injury.584 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.585 After receiving the Commissioner’s permission, the employer must post a notice from the DOL explaining the special minimum wage.586 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.587 The poster explains that employers must review special wages at least every six months and recalculate them whenever the general minimum wage increases.588 It also

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summarizes the laws regarding overtime, youth employment, fringe benefits, and the petitioning process for contesting a special wage. The DOL’s wage and hour complaint hotline prominently appears at the bottom of the poster.

X. WAGE ASSIGNMENTS

Wage assignments are contracts that transfer an employee’s right to collect his or her future wages to a third party. 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.

To be deemed valid in Massachusetts, all wage assignments must be in writing and they must “substantially conform” to a standard form provided in the statute. The employer must accept the wage assignment in writing, and the employee’s spouse must give his or her written consent as well. Employees may not assign wages to third parties if the intent is to relieve the employer of the obligation to pay wages.

The Commonwealth’s other requirements for valid wage assignments vary depending on whether the assignment is for or less than $3,000. 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.

Wage assignments that are greater than $3,000 have different and additional requirements. 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.

If a wage assignment meets the applicable statutory requirements, it will be enforceable even if the employee later declares bankruptcy. 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.
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. 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. Massachusetts law and the federal garnishment statute, known as the Consumer Credit Protection Act (CCPA), regulate garnishments in different ways. In general, the law permitting the smallest garnishment controls. 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 first $125.00 of all weekly net earnings. The CCPA, however, is more complex. First, its protections apply to everyone receiving “personal earnings.” The CCPA defines “personal earnings” as including net wages, salaries, commissions, bonuses, and pensions or other retirement income. The CCPA excludes tips from its definition of earnings; thus, employers cannot garnish tips under federal law. Next, the CCPA limits the earnings vulnerable to garnishment to those deemed “disposable earnings,” which are those wages left over after deducting mandatory withholdings. Employers should only exclude withholdings required by law from the “disposable” amount subject to garnishment. For instance, union dues, health insurance, and retirement plan contributions are not excluded from the employee’s disposable income.

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. 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.
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. The following table provides an example of garnishment calculations for a Massachusetts employee earning the state minimum wage of $8.00 per hour, using the current federal minimum wage of $7.25 per hour in the CCPA formulas.

### Calculating the Maximum Garnishment for a Massachusetts Employee Earning $8.00 per Hour With a Federal Minimum Wage of $7.25 per Hour

1. **Step 1:** Calculate disposable earnings (those wages left over after mandatory withholdings). We assume weekly earnings of $320.00 ($8.00 per hour x 40 hours worked) and disposable earnings of $220.00 per week.
2. **Step 2:** Massachusetts calculation. Total weekly earnings of $320.00 - $125.00 = $195.00 maximum weekly garnishment.
3. **Step 3:** CCPA calculation #1. 25% of $220.00 in disposable earnings = $55.00 maximum weekly garnishment.
4. **Step 4:** CCPA calculation #2. $220.00 - $217.50 (30 x $7.25 minimum wage) = $2.50 maximum weekly garnishment.
5. **Step 5:** Use the lowest garnishment amount of $2.50 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 law and federal law. Under Massachusetts law, the statutory $125.00 exemption does not apply to support orders. 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. If the support payments are more than twelve weeks in arrears, these limits increase to 55 percent and 65 percent, respectively. Support orders take priority over all other types of wage assignments and attachments, except IRS tax levies, which have equal status.

Massachusetts law permits an employer to deduct a 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. 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.

### 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. These protections apply to members of the military when they are on active duty, in the reserves, or in the National Guard. Members of the military are entitled to receive at least half of their net pay after all garnishments and deductions, and they are exempt from garnishment if their military service prevented them from complying with a court order.
D. Terminating Employees Subject to Garnishments

An employer may not terminate any employee because he or she is subject to a single garnishment. 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. However, an employee may be lawfully terminated if he or she is subject to multiple garnishments unless the garnishments are support orders. 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.

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 freely 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 many companies wrongly assume that classifying a worker as an independent contractor requires only that the parties enter into a contract and that the worker receive an IRS 1099 tax form. In fact, state and federal law specifically regulate and limit the circumstances under which a worker may legally be classified as an independent contractor.

In 2004, the Massachusetts legislature revised the state Independent Contractor Statute to curtail what it perceived as abuse and overuse of the classification. Since independent contractors are often not paid overtime, typically do not receive health insurance and other benefits, are not covered by unemployment or workers’ compensation insurance, and do not have taxes withheld, the Commonwealth recognized the potentially far-reaching consequences when employees are misclassified as independent contractors.

The Massachusetts Independent Contractor Statute is now one of the most restrictive in the country, sharply limiting those employees who may legitimately be classified as independent contractors. Further, the Massachusetts Attorney General has made prosecuting employers that misuse the independent contractor designation a top priority.

As discussed in Sections XV.B and XVI.B-C, the Attorney General’s Office enforces the wage and hour laws of Massachusetts. The office investigates employee misclassification complaints and may issue fines for violations. The Attorney General’s advisory on the Independent Contractor Statute (148B Advisory) warns employers 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.

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A. The ABC Test for Independent Contractors

The Massachusetts test for independent contractor status, commonly referred to as the “ABC test,” has three prongs, and the employer has the burden of proving that all three are met. Failing to establish just one prong is fatal to independent contractor status.

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 employer 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." The first 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 must 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 employer’s case, but conversely a contract that clearly labels someone as an independent contractor is insufficient by itself to establish independent contractor status.

The Independent Contractor Statute also requires freedom from the employer’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." These determinations are highly fact-specific. In examining the actual 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 own work schedule. Courts construe the control requirement narrowly, 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." The Attorney General recognizes that even bona fide independent contractors typically work under some level of supervision, but employers should be prepared to show that supervision was minimal.

2. Services Provided Are Outside the Usual Course of Business

The second prong of the ABC test, which is arguably the hardest for most employers to satisfy, requires that the individual’s services be performed outside the “usual course of business of the employee.” 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. An employer cannot meet this...
requirement simply by showing that the individual did his or her work at an outside location. Rather, under the revised Independent Contractor Statute, the nature of the work must be distinct from the types of services the employer typically provides.

Because Massachusetts courts have issued a limited number of opinions interpreting the meaning of the “usual course of business,” employers should look to other bodies of law in making a determination under the second prong of the ABC test. In a case interpreting the Massachusetts Unemployment Statute, which uses the same phrase, the court held that the services of news carriers were not outside the usual course of business because publishing and distributing a daily newspaper were activities that occurred in the usual course of the employer’s business—and that encompassed its news carriers’ task of delivering papers along their routes. 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.” By contrast, a 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. Employers should not classify individuals as independent contractors unless they are reasonably confident that the work at issue falls outside the scope of their own regular business.

3. Independent Trade, Occupation, Profession, or Business

The third prong of the ABC test requires an employer 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.” The focus of this prong is 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). 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. For instance, news carriers were found to be independent contractors when they were free to deliver papers from other publishers along their routes. Similarly, construction subcontractors met this requirement when they were free to work for competing general contractors if they so desired.

B. 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.” In order to demonstrate a violation of the statute, an individual must prove that he or she was improperly classified. In addition, 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. The relevant 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

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XIII. 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.661 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 bringing the action.662

Massachusetts forbids employers from taking any employment actions that penalize employees for pursuing their wage and hour rights.663 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 to wage and hour violations, and testifying (or being prepared to testify) in such a proceeding.664 The Commonwealth’s anti-

Even if an employer misclassifies an employee as an independent contractor, the employer is not liable for a violation of the Independent Contractor Statute so long as in doing so it does not violate any of the above wage and hour laws. 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.665 If an employee prevails in a suit for a violation of the Independent Contractor Statute and demonstrates some financial harm as a result of the violation, he or she is entitled to recover treble damages, as well as litigation costs and reasonable attorneys’ fees.

The employer may also be subject to significant civil or criminal penalties. 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 XVI.A-B.

C. Proposed Legislation Regarding Independent Contractor Classification

Over the past few years, the Massachusetts Legislature has considered modifications to the Independent Contractor Statute which would make it easier for employers to establish independent contractor relationships, generally by addressing the second prong of the ABC test, but as of yet, no bill has been presented to the Governor.666

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XIV. STATUTES OF LIMITATIONS

Employees must bring civil wage and hour claims against employers within either two or three years of a violation, depending on the type of violation involved.677 A table listing the statutes of limitations for the wage and hour violations that allow 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.678 If the violation is ongoing, only those individual violations which fall within the statute of limitations are timely.679 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.680

XV. COMPLAINTS AND INVESTIGATIONS

An employee seeking redress of certain wage and hour violations must file a complaint with the Attorney General’s Office,681 which then will choose to dismiss the complaint, investigate it, or authorize the employee to pursue an independent civil action.682 Employees may not sue employers for certain wage and hour violations without first exhausting their administrative remedies with the Attorney General.683 The following table lists the statutes of limitations and exhaustion requirements for those wage and hour violations that include a private right of action in Massachusetts.
### Statutes of Limitations and Exhaustion Requirements in Massachusetts

<table>
<thead>
<tr>
<th>Statute of Limitations</th>
<th>Offense With a Private Right of Action</th>
<th>Exhaustion Requirement</th>
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<tbody>
<tr>
<td>2 years</td>
<td>Overtime pay violations (M.G.L. ch. 151, § 1A)</td>
<td>None</td>
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<tr>
<td></td>
<td>Minimum wage violations (M.G.L. ch. 151, § 1)</td>
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<tr>
<td>3 years</td>
<td>Nonpayment of wages (M.G.L. ch. 149, § 148)</td>
<td>Must exhaust administrative remedies with the Attorney General696</td>
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<tr>
<td></td>
<td>Tip Statute violations (M.G.L. ch. 149, § 152A)</td>
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<tr>
<td></td>
<td>Independent Contractor Statute violations (M.G.L. ch. 149, § 148B)</td>
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<td></td>
<td>Improper expenditure of withholdings (M.G.L. ch. 149, § 150C)</td>
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<td></td>
<td>Improper deductions for tardiness or transportation services (M.G.L. ch. 149, § 152)</td>
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<td></td>
<td>Retaliation (M.G.L. ch. 149, § 148A)</td>
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### A. Procedure for Filing a Complaint With the Attorney General’s Office

To bring a claim for unpaid wages—including nonpayment of wages, earned vacation wages, tips, or meal breaks—an employee must first demand compensation from his or her employer.687 If the demand fails, the employee may file a complaint with the Fair Labor and Business Practices Division of the Attorney General’s Office.692 As indicated in the above table, employees complaining of overtime or minimum wage violations may proceed directly to Superior Court because they are not required to exhaust their administrative remedies.

To file such a complaint, an employee must complete a complaint form and provide supporting documentation.689 The complaint form must include the 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; the date the employee demanded compensation and the employer’s response; copies of pay stubs; a copy of the employer’s vacation policy, if relevant; and any other information pertinent to the claim.690 If the employee fails to provide sufficient information, the Attorney General’s Office may decline to process the complaint.691

The employee may bring a private action against the employer ninety days after complaining to the Attorney General.692 The employee may sue sooner if he or she receives written permission from the Attorney General.693

Federal law prohibits purely private settlements of wage claims because employees may not waive their wage and hour rights.694 Under the FLSA, parties can enter into a settlement agreement if a court or the DOL supervises the agreement.695 Because Massachusetts law has no similar requirement, private settlements of state claims are allowed. However, 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:

- The employer could pay any affected employee the additional wages due as a result of the error, and forego obtaining a release of claims. Setting or providing pay without a release leaves the employer exposed to future claims and treble damages.695
- 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. Also, although the federal courts and the DOL may facilitate settlements, it is unclear whether Massachusetts courts or the Attorney General have the authority to supervise private settlements of state wage and hour claims.
- 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.

B. The Attorney General's Investigatory Procedure

The Attorney General's Office may take several weeks or longer to process a complaint.697 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.698 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.699 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.700

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.701 The site inspector may also take notes, carry a voice recorder, and use a camera to document work conditions. He or she is likely to interview employees on site, hand out questionnaires for completion on site or after work, and request that the employer provide contact information for employees and supervisors.702 The employer may ask to have a company representative sit in on employee interviews, but it does not have a right to do so.703 The site inspector may also request copies of payroll records and prevailing wage schedules.704

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Given the myriad risks and considerations, the employer should consult with counsel before pursuing any of these options.
If the Attorney General’s Office determines that a wage and hour violation has occurred, it can impose a fine or pursue 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.

XVI. PENALTIES AND ENFORCEMENT

Employers and individuals who violate Massachusetts wage and hour laws are subject to civil penalties and, though rarely imposed, criminal penalties. Employers should obtain counsel immediately because this is a complex area and damages may be significant, particularly if a class action claim is brought.

A. 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.706

B. 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.707 Each failure to pay an employee the appropriate amount in a given pay period is a new violation, and each receives a separate citation.708 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.709 As a practical matter, employers that correct errors expeditiously and keep better records will minimize their liability.

As with criminal penalties, the amount of a civil fine depends on whether the employer committed a willful violation, and whether the incident was a first offense.710 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

<table>
<thead>
<tr>
<th>Penalties</th>
<th>Willful Offenses</th>
<th>Non-Willful Offenses</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>First Offense</td>
<td>Subsequent Offense</td>
</tr>
<tr>
<td>Civil Fines</td>
<td>$15,000</td>
<td>$25,000</td>
</tr>
<tr>
<td>Criminal Fines</td>
<td>$25,000</td>
<td>$50,000</td>
</tr>
<tr>
<td>Imprisonment</td>
<td>1 year</td>
<td>2 years</td>
</tr>
</tbody>
</table>

Within these ranges, the Attorney General has discretion in setting the amount of a civil fine, taking into account the specific circumstances of each violation. If the Attorney General’s Office determines that a wage and hour violation has occurred, it can impose a fine or pursue 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.
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.”

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.

Massachusetts law imposes additional penalties for employers with government contracts or subcontracts that violate 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. Employers that commit willful violations are barred for five years. Employers that commit non-willful violations are barred for six months for a first offense or three years for a subsequent offense.

C. 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. 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. If the hearing officer affirms the citation or order, the employer must either comply within thirty days or appeal to the Superior Court.

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. 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. The tax lien takes effect on the day after the payment was due. To remove a tax lien, an employer must pay the full amount of the penalty, plus interest, to the Massachusetts Department of Revenue.

D. 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. In a class action, the named plaintiff acts 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.

A plaintiff who wishes to bring his or her suit as a class action in Massachusetts 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 represent the interests of the class; (5) the representative parties will fairly and adequately

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E. Damages in Civil Lawsuits

An employee may file a civil wage and hour suit against an employer, but if the employee's claim requires the exhaustion of administrative remedies (see table at the beginning of Complaints and Investigations in Section XV), he or she must first obtain written authorization from the Attorney General's Office or wait ninety days after filing a complaint with that office. If successful, the plaintiff-employee can win a court order directing the employer to stop the challenged practice, and will recover lost wages. However, 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 allowing recovery for nominal or emotional distress damages.

In April 2008, the Massachusetts legislature enacted a statute making treble damages mandatory for certain wage and hour violations, so that the employer is required to pay the plaintiff-employee three times the actual damages proven in any case in which liability is established. The treble damages statute applies to almost all wage and hour claims, including nonpayment of wages, retaliation, 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.

Besides treble damages, the prevailing party in a wage and hour suit may also recover litigation costs and reasonable attorneys' fees. While it is well established that courts may award these expenses, there has been significant litigation regarding what constitutes "reasonable" attorneys' fees. 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.
Endnotes

1 See Massachusetts Department of Labor, Division of Occupational Safety (DOS) 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 V and VI.

2 29 C.F.R. § 778.105.

3 M.G.L. ch. 136, § 5.

4 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.

5 M.G.L. ch. 136, § 6(1).

6 M.G.L. ch. 136, § 6(2).

7 M.G.L. ch. 136, § 6(9).

8 M.G.L. ch. 136, § 6(52).

9 M.G.L. ch. 136, § 6(54).

10 M.G.L. ch. 136, § 7.

11 Id.

12 Id.

13 Id.

14 M.G.L. ch. 136, §§ 13-16.

15 M.G.L. ch. 4, § 7.

16 M.G.L. ch. 149, § 45.

17 M.G.L. ch. 136, § 6(6).

18 M.G.L. ch. 136, § 6(50).

19 Id. (the concept and calculation of “regular rate of pay” is discussed in Section VI.A). Some retail employers (such as gift shops and flower stores) may be exempt from the prohibition against work on Sunday pursuant to multiple 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 time for

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20 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.

21 M.G.L. ch. 136, § 6.

22 M.G.L. ch. 136, § 6(50).

23 M.G.L. ch. 136, § 6.

24 M.G.L. ch. 136, §§ 6(50), 13, 16.

25 M.G.L. ch. 136, § 15.

26 Id.

27 M.G.L. ch. 136, §§ 7, 15.

28 M.G.L. ch. 136, §§ 13-16.

29 DOS Memorandum, Columbus and Veteran's Day Permits for Holiday Openings (Aug. 20, 2010), available at http://www.mass.gov/?pageID=elwdmodulechunk&L=4&L0=Home&L1=Government&L2=Departments&L3=Division+of+Occupational+Safety&sid=Elwd&b=terminalcontent&f=dos_blue_law_columbus_veterans_permit_notice&csid=Elwd (last visited Aug. 26, 2010). DOS's authority to implement the Blue Laws arises from Massachusetts General Laws Chapter 136, Section 7, which gave the DOS's predecessor the authority to grant police department officials or city selectmen the power to issue permits allowing Sunday work.

30 M.G.L. ch. 136, § 5.

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


33 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.

34 M.G.L. ch. 149, § 48.

35 M.G.L. ch. 149, § 51.

36 Id.

37 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...
DOS have opined:

Opinion Letter MW-2008-002 (Jan. 18, 2008) (adopting federal approach). Therefore, both the DOL and

29 C.F.R. § 785.19.

employees “shall be allowed two days of twenty-four hours each in every month for rest with regular

compensation,” except during “extraordinary” emergencies.

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.

40 M.G.L. ch. 149, § 47.

43 M.G.L. ch. 149, § 51A.

44 M.G.L. ch. 149, §§ 47-48.


39 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.”

40 M.G.L. ch. 149, § 47.

41 M.G.L. ch. 149, § 49. There are other 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.

42 M.G.L. ch. 149, § 50.

38 Bujold v. EMC Corp.

37 M.G.L. ch. 149, § 51A.

45 29 C.F.R. § 785.7; 455 C.M.R. § 2.01. In addition, under both state 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 DOL Opinion Letter MW-2008-002 (Jan. 18, 2008) (adopting federal approach). Therefore, both the DOL and DOS 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 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); DOL 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. DOL Opinion Letter MW-2008-002 (Jan. 18, 2008).

46 M.G.L. ch. 149, § 100. Federal law does not require employers to provide meal breaks to employees.

29 C.F.R. § 785.19.
perform work without the appropriate compensation). That knows, or should know, that an employee is working cannot stand idly by and allow an employee to
employer's failure to pay is not a violation of the FLSA).
employee fails to notify the employer or deliberately prevents the employer from discovering the work, the
Forrester
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Meal Breaks
breaks.
agent who violates this section shall be punished by a fine of not less than three hundred nor more than
six hundred dollars.
M.G.L. ch. 149, § 100. The meal break statute states that any "employer, superintendent, overseer or
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six hundred dollars."
M.G.L. ch. 149, § 101.
In addition, as explained at the end of this section, the Massachusetts Supreme Judicial Court (SJC)
held that in some circumstances employees may pursue breach of contract claims for missed meal
breaks.
M.G.L. ch. 149, § 150.
Meal Breaks, supra note 48.

Under the Massachusetts minimum wage law, "working time" is defined, in part, 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 . . . ." 45 C.M.R. § 2.01. 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)).
(citing 29 C.F.R. § 785.11; Republican Publ'g Co. v. Am. Newspaper Guild, 172 F.2d 943, 945 (1st
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29 C.F.R. § 785.17; 455 C.M.R. § 2.03(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
required to remain on employer's premises).
Massachusetts Office of the Attorney General, Workplace Rights: Meal Breaks (2010), available at
http://www.mass.gov/?pagelD=cagoterminal&L=3&L0=Home&L1=Workplace+Rights&L2=Wage+and+Ho
ur&sid=Cago&b=terminalcontent&workplace=meal+brea&csid=Cago (last visited Apr. 5, 2010).
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Id. (citing Prime Commc'n's, Inc. v. Sylvester, 34 Mass. App. Ct. 708, 711, 615 N.E.2d 600 (1993), citing
Forrester, 646 F.2d at 414 (where an employer has no knowledge that an employee is working, and the
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not compensable where employees carried mobile telephones but were free to travel and pursue leisure

so).

See 29 C.F.R. § 785.71; 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).

55 C.M.R. § 2.03(1).

65 Id.


67 DOS Opinion Letter MW-2000-006 (Oct. 13, 2000) (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").

68 DOS Opinion Letter MW-2000-006 (Oct. 13, 2000). 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.” 455 C.M.R. § 2.03(3)(c); DOS Opinion Letter MW-2003-007 (Aug. 1, 2003).

69 For example, when an on-call technician was called into work for a job that took only one hour to complete, the DOS 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. DOS Opinion Letter MW-2002-015 (May 6, 2002). See also DOS Opinion Letter MW-2002-017 (June 4, 2002).

70 455 C.M.R. § 2.03(1).

71 29 C.F.R. § 785.21; 455 C.M.R. § 2.03(3)(a).

72 29 C.F.R. § 785.22; 455 C.M.R. § 2.03(3)(b).

73 29 C.F.R. § 785.22; 455 C.M.R. § 2.03(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.” 455 C.M.R. § 2.03(3)(c); DOS Opinion Letter MW-2003-007 (Aug. 1, 2003).

74 29 C.F.R. §§ 785.35-785.41; 455 C.M.R. § 2.03(4).

75 29 C.F.R. §§ 785.35-785.41; 455 C.M.R. § 2.03(4). This can include time spent commuting to and from work between shifts. See DOS Opinion Letter MW-2002-019 (June 28, 2002). In addition, 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. DOS Opinion Letter MW-2002-007 (Mar. 7, 2002). See also DOS 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).

76 455 C.M.R. § 2.03(4)(a). See also DOS Opinion Letter MW-2001-012 (Oct. 9, 2001) (length of temporary reassignment is irrelevant).

77 455 C.M.R. § 2.03(4)(b); 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. DOS Opinion Letter MW-2002-016 (May 6, 2002).

78 29 C.F.R. § 785.38; 455 C.M.R. § 2.03(4)(c) (applying requirements of 29 C.F.R. § 785.39 to overnight travel).


80 29 C.F.R. § 785.39.

81 455 C.M.R. § 2.03(4)(4)(c) (adopting provisions of 29 C.F.R. § 785.39).

82 29 C.F.R. § 785.41.

83 29 C.F.R. § 785.39.

84 DOS Opinion Letter MW-2007-001 (June 19, 2007) (citing guidelines from the Employee Commuting Flexibility Act of 1996). The DOS 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. DOS Opinion Letter MW-2003-006 (May 16, 2003).

85 M.G.L. ch. 149, § 178.


87 M.G.L. ch. 268, § 14A.


89 M.G.L. ch. 234A, § 49.

89 Id.

91 M.G.L. ch. 234A, § 51.

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85 M.G.L. ch. 149, § 178.


87 M.G.L. ch. 268, § 14A.


89 M.G.L. ch. 234A, § 49.

89 Id.

91 M.G.L. ch. 234A, § 51.
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).

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).

Because of the complexity of the FMLA and this publication’s focus on Massachusetts law, the FMLA will not be addressed in depth.

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).

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; to provide care to a spouse, child, or parent with a serious health condition; or for medical leave because of an employee’s own serious health condition. Because of the complexity of the FMLA and this publication’s focus on Massachusetts law, the FMLA will not be addressed in depth.

See Massachusetts Attorney General Advisory 98/1 (citing 29 C.F.R. § 825.200(b)).
M.G.L. ch. 149, § 52D(c); Massachusetts Attorney General Advisory 98/1. This allowance applies to non-exempt employees only. 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. See Section VII.A.2.

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

M.G.L. ch. 149, § 52D(c).

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

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

Massachusetts Attorney General Advisory 98/1.

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.

M.G.L. ch. 149, § 150.

M.G.L. ch. 149, § 180.

M.G.L. ch. 149, § 150.

M.G.L. ch. 149, § 148. An employer should obtain signed, written authorization from any exempt employees who choose to be paid monthly.

Id.

Id. A limited exception to this rule applies to employees who work seven days in a calendar week, in which case they may be paid within seven days of the end of the pay period. However, if an employee works seven days in a calendar week, as required by this provision, the employer is likely violating the Day of Rest in Seven or Sunday work laws.

Id.

Id.

Id.

Id.


M.G.L. ch. 149, § 148. For a discussion of commissions and calculation of regular rate of pay under state and federal law, see Section VI.A.

Vacation pay may be "lost by disuse." 


Id. at 69; 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.").

EDSC II, 454 Mass. 63; Massachusetts Attorney General Advisory 99/1.

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.'").

Massachusetts Attorney General Advisory 99/1.

Id.

Elec. Data Sys. Corp. v. Attorney Gen., 440 Mass. 1020, 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).

Massachusetts Attorney General Advisory 99/1.

Id. Such caps must be applied prospectively. Id.

Massachusetts Attorney General Advisory 99/1. See also EDSC II, 454 Mass. at 69 (noting that vacation pay may be "lost by disuse").

Massachusetts Attorney General Advisory 99/1.

Id.
As explained in Sections VI.A.3, bonuses are not includable in regular rate calculations under Massachusetts law, regardless of whether they are discretionary. However, as explained in Section VI.A.1-2, some bonuses are includable in regular rate under federal law.

M.G.L. ch. 154, § 8.

M.G.L. ch. 149, § 148.


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

12 C.F.R. § 205.10(e)(2).


455 C.M.R. § 2.04(1).


455 C.M.R. § 2.04(1)(a).

Id.

170 Id.

171 455 C.M.R. § 2.04(1)(b). Federal regulations regarding deductions for meals are found at 29 C.F.R. § 778.304(a)(1).

455 C.M.R. § 204(1)(b). For federal regulations regarding uniform deductions, see 29 C.F.R. § 778.304(a)(2).
173 455 C.M.R. § 2.01.

174 Id.

175 Id.

176 455 C.M.R. § 2.04(2)(a). See also DOS Opinion Letter MW-2001-019 (Dec. 26, 2001) (“If the employer launders its required uniforms, it may not deduct the cost of laundering from an employee’s wages if doing so would reduce that employee’s wage below the statutory minimum wage. . . . If the employee does his or her own uniform laundering, the result must be the same—it must be at no cost to the employee’s minimum wage.”).

177 455 C.M.R. § 2.04(2)(a).

178 455 C.M.R. § 2.04(3).

179 M.G.L. ch. 149, § 152.

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

181 M.G.L. ch. 149, § 150A.

182 Id.

183 M.G.L. ch. 200A, § 1.

184 M.G.L. ch. 200A, § 5.

185 M.G.L. ch. 200A, § 7A.

186 Abandoned property form available at http://www.mass.gov/?pageID=terminal&L=2&L0=Home&L1=Abandoned+Property+Information&sid=Ctre&terminalcontent&f=abp_abp_formsLibrary&csid=Ctre (last visited Apr. 5, 2010). 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.


188 The “workweek,” which is discussed in Section I, forms the basis for determining an employer’s minimum wage and overtime obligations.

189 M.G.L. ch. 151, § 1. See Section I.D for a detailed discussion of how to determine the “hours worked” by an employee.


191 M.G.L. ch. 151, § 1.

192 M.G.L. ch. 151, §§ 1-2.

193 M.G.L. ch. 151, § 2.
As in the Massachusetts Minimum Fair Wage Law, the FLSA specifically excludes certain types of work. See 29 U.S.C. §§ 206-207; Baystate Alternative Staffing, Inc. v. Herman, 163 F.3d 668, 675 (1st Cir. 1998). 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 their employees work.

See M.G.L. ch. 151, § 2.

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.

See infra notes 204-231 and accompanying text.

"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 VII.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.

203 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.

204 DOS 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 DOS (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. DOS Opinion Letter MW-2002-021 (Aug. 9, 2002).

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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”).

See also DOS 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”).

DOS Opinion Letter MW-2002-013 (May 9, 2002).


DOS Opinion Letter MW-2003-002 (Feb. 10, 2003). Massachusetts law also includes a “qualified trainees” exemption for bona fide executive, administrative, professional trainees that 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.

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workers performed the same tasks as regular employees and worked unsupervised, and the organization
training program for the homeless were employees because participation was indefinite in duration, the
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exchange for housing valued at $15.00 per night were employees because the employer derived an

Letter FLSA1994 (Mar. 25, 1994) (student interns who managed hostels for twenty-five hours per week in

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).

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
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
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exchange for housing valued at $15.00 per night were employees because the employer derived an
immediate advantage from the work performed).

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

Archie 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).

DOL Field Operations Handbook § 10b11 (stating that all six criteria must be met). See also Donovan v.
Am. Airlines, Inc., 686 F.2d 267 (5th Cir. 1982) (Donovan II) (holding that all six criteria must be met).

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
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classroom setting (DOL Wage & Hour Opinion Letter FLSA1996 (May 8, 1996)).
exploration while doing little actual work in return, and the sponsor invested substantial resources in designing and administering the program).


232 455 C.M.R. § 2.01 et seq. While Massachusetts allows an employer to pay the service rate to a tipped employee earning at least $20.00 per month in tips, the FLSA requires that the employee earn more than $30.00 per month in tips. See id.; 29 U.S.C. § 203(i). A tipped employee may be paid $2.13 per hour under federal law. See 29 U.S.C. § 203(i).

233 455 C.M.R. § 2.05(1).

234 A "bona fide educational institution" is one that is accredited by a recognized source. 455 C.M.R. § 2.01.

235 455 C.M.R. §§ 2.01 and 2.05.


237 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 regional office with jurisdiction over their state. The Northeast Region office can be reached at (215) 861-5800.)

238 29 C.F.R. § 525.9; M.G.L. ch. 151, § 9.

239 M.G.L. ch. 151, § 9.

240 29 C.F.R. § 525.7.

241 M.G.L. ch. 151, § 9.


243 29 C.F.R. § 525.3(d).

244 Id.

245 29 C.F.R. § 525.9(b).


247 M.G.L. ch. 149, § 26; DOS Opinion Letter MW-2006-002 (June 12, 2006) (noting that the Commonwealth’s overtime requirements apply equally to employees paid a prevailing wage); DOS 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 eight per day was repealed, and Massachusetts only requires overtime pay for
hours worked in excess of forty per week). An employer’s obligation to provide overtime compensation is discussed at length in Section VI.

248 M.G.L. ch. 149, § 26.
249 Id.
250 M.G.L. ch. 149, § 27F.
251 M.G.L. ch. 149, § 26.
252 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.”).

253 DOS, Topical Outline of Massachusetts Prevailing Wage Law, at 11-12 (Jan. 2010).
254 See id.
255 M.G.L. ch. 149, § 26.
257 Id.

258 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.
260 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 where a covered employee works more than forty hours in a given workweek regardless of how many hours were worked on any particular day.

261 29 U.S.C. § 207.
262 M.G.L. ch. 151.

263 One court has found that the Massachusetts overtime statute may apply to hours worked outside of the Commonwealth. In Gonyou v. Tri-Wire Engineering Solutions, Inc., the court denied an employer’s motion to dismiss an action for overtime hours allegedly worked in Connecticut, reasoning that the statute applies to “a Massachusetts corporation that operates in the Commonwealth and elsewhere . . . .” No. 10-40011-NMG, at 6 (D. Mass. May 25, 2010) (Gorton, J.). The court limited its ruling to the facts and circumstances of the case, but the decision’s implications are troubling.

264 Id.
265 Id.
266 455 C.M.R. § 2.01.

268 M.G.L. ch. 149, § 26.
269 Id.
270 M.G.L. ch. 149, § 27F.
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274 See id.
275 M.G.L. ch. 149, § 26.
277 Id.

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284 Id.
285 Id.
286 455 C.M.R. § 2.01.
266 M.G.L. ch. 151, § 1A.
268 29 C.F.R. § 778.208.
269 29 C.F.R. § 778.209.
270 29 C.F.R. § 778.209(a).
271 29 C.F.R. § 778.209(b).
272 29 C.F.R. § 778.111.
273 29 C.F.R. § 778.418.
274 29 C.F.R. § 778.112.
275 Id.
276 29 C.F.R. § 778.113(b).
277 Id.
278 Id.
279 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).
280 29 C.F.R. § 778.114.
281 Id.
282 Id.
283 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).
284 29 C.F.R. § 778.114.
285 Id.
286 Id.
287 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.
288 Id.
289 Id.
290 Id.
291 Id.
292 Id.
293 Id.
294 Id.
295 Id.
296 Id.
297 Id. This method is very complex and its use is even more restrictive than the fluctuating workweek 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.

293 See DOS 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 DOS Opinion Letter MW-2002-003 (Jan. 25, 2002). Federal law allows 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.

294 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.


296 M.G.L. ch. 151, § 1A(3).

297 455 C.M.R. § 2.02(3). 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 VII.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").

298 Some of the white collar exemptions provide for exceptions from the $455.00 per week minimum salary and salary basis requirements.

299 29 C.F.R. § 541.400.

300 29 C.F.R. § 541.100(a)(1); 29 C.F.R. § 541.200(a)(1); 29 C.F.R. § 541.300(a)(1).
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).


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.
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 II.B.2, there are additional risks associated with deductions from leave or vacation banks under Massachusetts law because vacation time is considered wages.

Id.

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.").

Id.

See Havey v. Homebound Mortgage, 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).

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Archuleta, 543 F.3d 1226; but see Thomas v. County 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).

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Moore v. Hannon Food Serv., Inc., 317 F.3d 489, 498 (5th Cir. 2003) (reimbursement made five days before trial preserved exemption); Dougherty v. Blize, 2008 WL 2543430, at *4 (D. Del. June 25, 2008) (reimbursement made one year and four months after deduction sufficient to preserve exemption). Because the DOS has adopted the federal regulations addressing the white collar exemptions, arguably the safe harbor applies under Massachusetts law as well.


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 VII.A.4.

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361. 29 C.F.R. § 541.105.

362. Id.

363. Id.

364. Id.

365. 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).

366. 29 C.F.R. § 541.106(a).

367. Id.

368. Id.

369. 29 C.F.R. § 541.106(b).

370. Id.

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

372. Id.

373. Id.


375. 29 C.F.R. § 541.106(c).

376. Id.


378. Id. at 172.

379. 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.

380 29 C.F.R. § 541.201(a).

381 Id.

382 29 C.F.R. § 541.201(b); DOL Wage & Hour Fact Sheet #17C (July 2008).

383 29 C.F.R. § 541.201(b); DOL Wage & Hour Fact Sheet #17C (July 2008).

384 29 C.F.R. § 541.700; DOL Wage & Hour Fact Sheet #17C (July 2008).

385 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).

386 Id.

387 The administrative-production dichotomy recently has received renewed attention after the DOL's Wage and Hour Division issued an "Administrative 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.

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

389 29 C.F.R. § 541.201(c).

390 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" client's businesses, even though their own employer's primary business was to sell the claims processing services they performed).

391 29 C.F.R. § 541.202(a).

392 Id.

393 29 C.F.R. § 541.202(b).

394 Id.


396 29 C.F.R. § 541.202(c).

397 Id.

398 Id.

399 29 C.F.R. § 541.202(e); 29 C.F.R. § 541.704.

400 29 C.F.R. § 541.202(e); 29 C.F.R. § 541.704.
Teachers are not subject to salary basis requirements. 29 C.F.R. § 541.303(a); DOS Opinion Letter MW-2004-001 (Dec. 16, 2004).
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).


29 C.F.R. § 541.301(e).
29 C.F.R. § 541.301.

DOS Opinion Letter MW-2008-004 (July 14, 2008) (DOS 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 professionals exemption.

While no Massachusetts authority specifically adopts this provision, the reasoning applied by the DOS in a recent opinion letter adopting the FLSA’s exemption for highly compensated employees appears equally relevant to the computer professionals exemption. See DOS Opinion Letter MW-2008-004 (July 14, 2008) (DOS 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 professionals exemption.

29 C.F.R. § 541.302.
29 C.F.R. § 541.302(a).
29 C.F.R. § 541.302(c).

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”).

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”).

29 C.F.R. § 541.400.

outside sales activities.

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.”).

Id. (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 2188990 (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).


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

29 C.F.R. § 541.601; DOL Wage & Hour Fact Sheet #17H (July 2008).

Id.

Id.


Id.

Id.
make daily visits to their employers' places of business without losing their federal exemption.

unreasonable wage . . . .") (emphasis added).

example, if an employee earns $400.00 and works forty hours, the regular rate of pay is $10.00 per hour. Total number of hours worked into straight-time earnings for those hours. 29 C.F.R. § 779.419. For employers from the requirement of paying overtime to retail and service employees who are paid primarily 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).

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.


Id.

M.G.L. ch. 151, § 1A(4).

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).

29 C.F.R. § 779.411.

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.

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

29 C.F.R. § 779.417.

Id.; 29 C.F.R. § 779.414.

29 C.F.R. § 779.417(d).

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


See M.G.L. ch. 151, § 1A(11); M.G.L. ch. 159A.
Massachusetts exemption is limited to “drivers or helpers on trucks” and therefore excludes loaders and commerce. M.G.L. ch. 151, § 1A(8). Without compensation, 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.

The Massachusetts motor carrier exemption is also limited to employees moving goods in interstate commerce. M.G.L. ch. 151, § 1A(8).

See 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. DOS 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.’”).

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.

The Massachusetts motor carrier exemption is also limited to employees moving goods in interstate commerce. M.G.L. ch. 151, § 1A(8).
mechanics; DOS 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).

DOS 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.”); DOS 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 DOS 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.


M.G.L. ch. 151, § 1A(11).

See M.G.L. ch. 159A, § 1.


See Jeffrey v. Sarasota White Sox, Inc., 64 F.3d 590 (11th Cir. 1995).


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 IV) (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).

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).

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.


M.G.L. ch. 151, § 1A(20).

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M.G.L. ch. 151, § 1A(20).
earned by the employee would be based on the federal minimum wage.

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 state minimum wage as discussed in Section VII.A.1. However, if the banquet server is a tipped employee and the employer takes the tip credit and pays the employee an hourly rate of $2.63 per hour (discussed in Section VIII.E), the amount of any overtime compensation earned by the employee would be based on the federal minimum wage.

The term “sanitorium” is not defined in the statute. However, the DOS 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 DOS], and its predecessor, the Department of Labor and Industries, have narrowly construed this exemption.” DOS Opinion Letter MW-2001-016 (Nov. 19, 2001).

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 . . . .” DOS Opinion Letter MW-2002-014 (Apr. 30, 2002).

A business that operates multiple seasonal operations with distinct workforces may apply different seasonal exemptions to those workforces. DOS Opinion Letter MW-2007-003 (Sept. 24, 2007).


Id.

M.G.L. ch. 151, § 1A. The Department of Labor and Workforce Development 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. DOS Opinion Letter MW-2006-001 (Mar. 10, 2006).

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 state minimum wage as discussed in Section VII.A.1. However, if the banquet server is a tipped employee and the employer takes the tip credit and pays the employee an hourly rate of $2.63 per hour (discussed in Section VIII.E), the amount of any overtime compensation earned by the employee would be based on the federal minimum wage.

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See id.

M.G.L. ch. 149, § 152A(a)-(b).


M.G.L. ch. 149, § 152A (1966).

M.G.L. ch. 149, § 152A (1980).

M.G.L. ch. 149, § 152A (1983).
§ 531.50 et seq. Also, unlike the state Tip Statute, it is not clear that the FLSA applies to tips at all unless the employer is taking the tip credit, described in Section VIII.E. See 29 U.S.C. § 203 et seq.; 29 C.F.R. § 531.50 et seq.; see Cumbie v. Wendy Woo, Inc., No. 08-35719 (9th Cir. Feb. 23, 2010) (O’Scannlain, J.) (holding FLSA did not apply to tips where employer had not elected to take the tip credit).

§ 531.501. 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. 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

§ 531 M.G.L. ch. 149, § 152A. Whether the 2004 amendments should be applied retroactively is a point of debate. No appellate court has ruled on this issue. Employers opposing retroactive application will likely argue that the amendments changed—rather than merely clarified—the Tip Statute. At least one Massachusetts trial court has suggested that the 2004 amendments clarify the Tip Statute’s prior language and thus may apply retroactively. Shea v. Weston Golf Club, 22 Mass. L. Rptr. 437, 2007 WL 1537665, at *1 (Mass. Super. Ct. May 18, 2007) (holding that 2004 amendments may be retroactive but holding that result under case’s particular facts would be the same under either version of Tip Statute). In contrast, a more recent Superior Court decision did not apply the 2004 amendments retroactively. DePina v. Marriott Int’l, Inc., No. SUCV2003-5434-G (Mass. Super. Ct. July 28, 2009) (Henry, J.).

§ 529 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. DiFio 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 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).


§ 527 M.G.L. ch. 149, § 152A(a).

§ 526 M.G.L. ch. 149, § 152A(a). 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).

§ 525 Cooney v. Compass Group 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).

§ 524 See also Cumbie v. Wendy Woo, Inc., No. 08-35719 (9th Cir. Feb. 23, 2010) (O’Scannlain, J.) (holding FLSA did not apply to tips where employer had not elected to take the tip credit).

§ 523 M.G.L. ch. 149, § 152A. Whether the 2004 amendments should be applied retroactively is a point of debate. No appellate court has ruled on this issue. Employers opposing retroactive application will likely argue that the amendments changed—rather than merely clarified—the Tip Statute. At least one Massachusetts trial court has suggested that the 2004 amendments clarify the Tip Statute’s prior language and thus may apply retroactively. Shea v. Weston Golf Club, 22 Mass. L. Rptr. 437, 2007 WL 1537665, at *1 (Mass. Super. Ct. May 18, 2007) (holding that 2004 amendments may be retroactive but holding that result under case’s particular facts would be the same under either version of Tip Statute). In contrast, a more recent Superior Court decision did not apply the 2004 amendments retroactively. DePina v. Marriott Int’l, Inc., No. SUCV2003-5434-G (Mass. Super. Ct. July 28, 2009) (Henry, J.).

§ 522 See M.G.L. ch. 149, § 152A.

§ 521 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 state Tip Statute, it is not clear that the FLSA applies to tips at all unless the employer is taking the tip credit, described in Section VIII.E. See 29 U.S.C. § 203 et seq.; 29 C.F.R. § 531.50 et seq.; see Cumbie v. Wendy Woo, Inc., No. 08-35718 (9th Cir. Feb. 23, 2010) (O’Scannlain, J.) (holding FLSA did not apply to tips where employer had not elected to take the tip credit).

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§ 519 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. DiFio 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.”).
[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." No. SUCV2005-0569-BLS1, at 7 (Mass. Super. Ct. May 4, 2009) (Hinkle, J.).


Mouiny, No. SUCV2006-1115-BLS1, at 14 (Mass. Super. Ct. Aug. 18, 2008) ("it is doubtful that any reasonable patron would expect that a 'station fee' would be paid directly to the wait staff . . . ."); Hernandez, No. SUCV2005-0569-BLS1, at 7 (Mass. Super. Ct. May 4, 2009) (holding no reasonable patron would expect a fee to be remitted to wait staff in lieu of or in addition to a tip where the banquet menu "clearly list[s] an additional flat fee for an 'Attendant Facility Fee' or a 'Station Attendant Facility Fee'"; DePina, No. SUCV2003-5434-G, at 17 (Mass. Super. Ct. July 28, 2009) ("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").

M.G.L. ch. 149, § 152A(d).


See, e.g., Williamson, 2004 WL 1050582, at *11.

M.G.L. ch. 149, § 152A(a). Notably, the service bartender definition does not include the managerial responsibilities prohibition.


See id. (banquet captain may meet service employee definition) (emphasis added).

See M.G.L. ch. 149, § 152A(a) (emphasis added).

Massachusetts Attorney General Advisory 2004/3, at 2 n.3 (citing 29 C.F.R. § 541.1) (emphasis added).
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).

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).


Id. (emphasis added) (also noting that one should not ‘mistakenly equate ‘supervisory responsibility’ with ‘managerial responsibility’”).

Godt v. Anthony’s Pier 4, Inc., No. SUCV2007-3819-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).

Id.


Massachusetts Attorney General Advisory 2004/3.

M.G.L. ch. 149, § 152A(c).

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).

M.G.L. ch. 149, § 152A(e).


455 C.M.R. § 2.01. 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).

See 455 C.M.R. §§ 2.01-2.02(2).
employees, they may be used in their entirety to satisfy the monetary requirements of the Act."

However, where such sums are distributed by the employer to his 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. DOS Opinion Letter MW-2003-012 (Nov. 24, 2003).

Under the FLSA, while a service charge paid to an employee counts towards the minimum wage, it is not a tip and technically the employer is not taking the tip credit on the payment. See 29 C.F.R. § 531.55 ("Service charges and other similar sums which become part of the employer's gross receipts and service rate only refer to tips and not service charges, the DOS (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.; 455 C.M.R. § 2.02(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 technically the employer is not taking the tip credit on the payment. See 29 C.F.R. § 531.55 ("Service charges and other similar sums which become part of the employer's gross receipts are not tips for the purposes of the Act. However, where such sums are distributed by the employer to his employees, they may be used in their entirety to satisfy the monetary requirements of the Act.").

M.G.L. ch. 149, § 152A(a) (2004) (emphasis added).

DiFiore, 454 Mass. at 497.

Id. at 488.

Id. at 497.

Id. at 493-94.

M.G.L. ch. 149, § 152A(f).

M.G.L. ch. 149, § 150.

See, e.g., Wiedmann, 444 Mass. at 709 n.13. Attorneys' fees and costs are discussed in depth in Section XVI.

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.htm (last visited Apr. 7, 2010). Posters are available in English and Spanish.

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573 M.G.L. ch. 151, § 16; 455 C.M.R. § 2.06(1) (this rule does not apply to domestic service employees who work in their employers’ homes).


575 Id. All of the posters described in this section are available on the Attorney General’s website. 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, and the enforcement of these laws. DOL Compliance Poster, Employee Rights Under the Fair Labor Standards Act (July 2009), available at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm (last visited Apr. 7, 2010). 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.

576 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 Mass. Super. LEXIS 571, at *36 (holding that the law “prohibits 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 the sponge 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.

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

578 Id.

579 Id.

580 M.G.L. ch. 149, § 74.

581 Id.


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578 Id.

579 Id.

580 M.G.L. ch. 149, § 74.

581 Id.
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.”). 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”).

The statutory requirements must be satisfied. See Opinion of Justices, 267 Mass. 607, 609, 166 N.E. 401 (1929) (noting that wage assignments must be memorialized in writing). 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 Opinion of Justices, 267 Mass. at 609 (noting that wage assignments must have written consent of employee’s wife).

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602 15 U.S.C. § 1672(c); 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).


606 M.G.L. ch. 246, § 28.

607 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).

608 DOL Wage & Hour Fact Sheet #30 (July 2009).

609 Id.


611 DOL Wage & Hour Fact Sheet #30 (July 2009).

612 Id.


614 Id.

615 Id.


617 M.G.L. ch. 246, § 28.


619 Id.

620 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.”).

2010) (stating that whichever submission the state Department of Revenue receives first will be processed first).


625 Id.

626 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.”).


630 M.G.L. ch. 119A, § 12(f)(2).

631 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. M.G.L. ch. 149, § 148B(a)(1). 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. The economic reality test has seven factors but focuses somewhat heavily on the degree of control that the employer has over the worker. Although the conclusions under the various tests may be similar, separate analysis is required to avoid violations.

632 Massachusetts Attorney General Advisory 2008/1.

633 See M.G.L. ch. 149, § 148B(a)(1).

634 See generally Massachusetts Attorney General Advisory 2008/1.

635 Penalties for violations of state wage and hour laws are discussed further in Section XVI.

636 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
- Individuals are providing services who are paid “off the books.” “under the table,” in cash or provided no documents reflecting payment

637 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. M.G.L. ch. 149, § 148B(a)(1). 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. The economic reality test has seven factors but focuses somewhat heavily on the degree of control that the employer has over the worker. Although the conclusions under the various tests may be similar, separate analysis is required to avoid violations.

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- Individuals are providing services for an employer that are not reflected on the employer’s business records
- 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.


Scalli, 2008 WL 1581625, at *14 (citing Silva v. Dir. of Div. Employment Sec., 398 Mass. 609, 611, 499 N.E.2d 1205 (1986)); Athol' 439 Mass. at 175 (finding that employer bears burden of establishing all three prongs of ABC test for purposes of Massachusetts Unemployment 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.

Massachusetts Attorney General Advisory 2008/1, at 5-6.


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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).

640 M.G.L. ch. 149, § 148B(a)(1).

641 See Scalli v. Coverall North America, Inc., 2010 U.S. Dist. LEXIS 29088 (D. Mass. Mar. 23, 2010), the court found that a franchisor of cleaning franchises had not satisfied prong two of the independent contractor test. Specifically, the franchisor had argued that it was in the business of selling franchises, not in the cleaning business. The court held that the plaintiff-franchisees were misclassified as independent contractors.

642 Massachusetts Attorney General Advisory 2008/1, at 3.

643 Col. News Serv., 2006 Mass. Super. LEXIS 470, at *15. See also Am. Zurich Ins., 2006 Mass. Super. LEXIS 333, at *11 (“Factors 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., 2005 Mass. Super. LEXIS 586, at *8-9 (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 his 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 Unemployment and Independent Contractor Statutes.

644 M.G.L. ch. 149, § 148B(a)(2).

645 Massachusetts Attorney General Advisory 2008/1, at 2.

646 See id.

647 Prior to the 2004 Amendments to the Independent Contractor Statute, employers could satisfy the second prong by demonstrating that the worker performed his or her duties at an outside location. M.G.L. ch. 149, § 148B.

648 In Awuah v. Coverall North America, Inc., 2010 U.S. Dist. LEXIS 29088 (D. Mass. Mar. 23, 2010), the court found that a franchisor of cleaning franchises had not satisfied prong two of the independent contractor test. Specifically, the franchisor had argued that it was in the business of selling franchises, not in the cleaning business. The court held that the plaintiff-franchisees were misclassified as independent contractors.

649 See Scalli v. Coverall North America, Inc., 2006 WL 1581625, at *14 (finding that contract which referred to individuals as “employees” weighed against argument that they were independent contractors).

650 M.G.L. ch. 149, § 148B(a)(1).

651 See Scalli v. Coverall North America, Inc., 2006 WL 1581625, at *14 (finding that contract which referred to individuals as “employees” weighed against argument that they were independent contractors).

652 Massachusetts Attorney General Advisory 2008/1, at 3.

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654 M.G.L. ch. 149, § 148B(a)(2).

655 Massachusetts Attorney General Advisory 2008/1, at 2.

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503 Athol, 439 Mass. at 179 (interpreting the Unemployment Statute, M.G.L. ch. 151A, § 2). See also Coll. News Serv., 2006 Mass. Super. LEXIS 470, at *16 (finding that services provided by news 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).


507 M.G.L. ch. 149, § 148B(a)(3).


509 Id. at 180.

510 Athol, 439 Mass. at 182 (interpreting the Unemployment Statute, M.G.L. ch. 151A, § 2). See also Coll. News Serv., 2006 Mass. Super. LEXIS 470, at *17 (finding that newspaper carriers were independent contractors because they could choose to work for other competing publishers).

512 Id. at 180.

514 Athol, 439 Mass. at 182 (interpreting the Unemployment Statute, M.G.L. ch. 151A, § 2). See also Coll. News Serv., 2006 Mass. Super. LEXIS 470, at *17 (finding that newspaper carriers were independent contractors because they could choose to work for other competing publishers).

515 Am. Zurich Ins., 2006 Mass. Super. LEXIS 333, at *17; but see Rainbow Dev., 2005 Mass. Super. LEXIS 586, at *10-11 (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). 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).

518 M.G.L. ch. 149, § 148B(d).

519 Massachusetts Attorney General Advisory 2008/1, at 4.

521 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.


525 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).

527 See also Coll. News Serv., 2006 Mass. Super. LEXIS 470, at *16 (finding that services provided by news 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).


531 M.G.L. ch. 149, § 148B(a)(3).


534 Id. at 180.

535 Athol, 439 Mass. at 182 (interpreting the Unemployment Statute, M.G.L. ch. 151A, § 2). See also Coll. News Serv., 2006 Mass. Super. LEXIS 470, at *17 (finding that newspaper carriers were independent contractors because they could choose to work for other competing publishers).

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539 M.G.L. ch. 149, § 148B(d).

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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)).

M.G.L. ch. 149, § 148A.

Id.

See generally Smith, 447 Mass. 363.

Id.

Id. A question remains as to whether an employee asserting a statutory retaliation claim may also bring common law wrongful discharge claims. At least one court has found these two causes of action to be redundant, holding that "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." 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).

M.G.L. ch. 149, § 148A.

Id.

Id. at 138.

Id. at 139.

Id. at 139.

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 XVI. See M.G.L. ch. 149, §§ 148A, 30C, and 33B-33C.

M.G.L. ch. 151, § 19.


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

Koe v. Mercer, 450 Mass. 97, 101, 86 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 omitted).

Williamson, 2004 WL 1050582, at *16-17 (rejecting continuing violation theory in wage case).


How to File a Wage Complaint, supra note 690.

Id.

M.G.L. ch. 149, § 150.

Id.

See, e.g., Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 704, 65 S.Ct. 896, 89 L.Ed. 1296 (1945) (holding that FLSA claims may not be waived because “where 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”).
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.”).

See Penalties and Enforcement, Section XVI.

How to File a Wage Complaint, supra note 690.

Id.

Massachusetts Office of the 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."

E-mail from J. Jones, Deputy Chief, Fair Labor Division, Massachusetts Office of the Attorney General, to B. Gobeille, Associate, Seyfarth Shaw LLP (Feb. 4, 2009) (hereinafter “E-mail from Fair Labor Division”) on file with authors.

Fair Labor Site Inspections, supra note 700.

Id.

E-mail from Fair Labor Division, supra note 701.

Fair Labor Site Inspections, supra note 700.

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 (quotations omitted).

M.G.L. ch. 149, § 27C(b)(1).

Id.; see generally M.G.L. ch. 151, § 19.

M.G.L. ch. 151, § 19(3).

M.G.L. ch. 149, § 27C(b)(1)-(2).

M.G.L. ch. 149, § 27C(b)(2).

M.G.L. ch. 151, § 19.

M.G.L. ch. 149, § 27C(a)(3).
opposing the retroactive application of the treble damages provision have strong arguments on their side. However, employers violations cannot be applied retroactively (June 2, 2008); R. Alfred, Mass. Lawyers Weekly, “(June 1, 2009).  Massachusetts was the first state in the

Mandatory treble damages law spurs debate over retroactivity

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 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).

Williamson, 2004 WL 1050582, at *15 (noting that “this entitlement argument is notably lacking in legal support”).

Id.

See, e.g., Williamson, 2004 WL 1050582, at *15.

M.G.L. ch. 149, § 150.

M.G.L. ch. 149, § 27C(b)(6).

The SJC has held that changes in the law that increase or decrease liability impact “substantive rights” that cannot be changed retroactively. Fontaine v. Ebitec Corp., 415 Mass. 309, 613 N.E.2d 881 (1993). Moreover, the treble damages statute does not expressly state that it applies retroactively; in fact, the last draft of the statute that was enacted includes legislative changes to prior drafts indicating that the legislature did not intend the statute to be applied retroactively.

One Superior Court decision applied the amendment retroactively. Rosnov, No. ESCV2007-0740 (Mass. Super. Ct. Apr. 10, 2009). In doing so, the court relied solely on the fact that “violators of the Wage Act have always been subject to treble damages” to reach the conclusion that the amendment did not “substantially change[] parties [sic] rights and expectations.” Id. at 8. The court did not consider the statutory language or legislative intent, stating that “[n]either party addresses whether this amendment is applicable to the present case, where the violative conduct occurred before the amendment but the judgment occurred after.” Id. at 7; direct appellate review granted by the SJC on July 23, 2010. Three trial level courts have held that the treble damages provision is not retroactive. Pantano v. Artificial Life Inc., No. SUVCV2004-1879 (Mass. Super. Ct. Sept. 23, 2008) (Brassard, J.) (“There is no explicit or implicit indication of intent that [the treble damages provision] apply retroactively. To the extent there may be uncertainty about the application of new legislation, the court should resolve that uncertainty against retroactive application.”); DiFiore, No. 07-10070-WGY (D. Mass. Dec. 23, 2009) (finding that statute is not remedial and absence of legislative intent to make it retroactive); Hernandez, No. SUCV2005-0569-LSL1 (Mass. Super. Ct. Feb. 8, 2010) (finding persuasive the reasoning of DiFiore and rejecting analysis of Rosnov).

If the mandatory treble damages provision is not retroactive, courts still have discretion to award treble damages for wage and hour violations occurring before July 13, 2008. See Killeen v. Westban Hotel Venture, LP, 69 Mass. App. Ct. 784, 790, 872 N.E.2d 784 (2007). In these cases, courts are more likely to award treble damages when an employer’s or supervisor’s behavior was deemed “outrageous or showed a reckless indifference to the rights of others.” Id.; Wiedmann, 444 Mass. at 710. For instance, when the Hilltop Steakhouse gave shares of tips to managers and then fired wait staff after they complained, a jury awarded the four aggrieved former employees three times their actual damages, for a total award of $1,800,000. Calcagno v. High Country Investors, 22 New England Jury Verdict Rev. & Analysis, Case No. ESCV2003-5707 (Mass. Super Ct. July 25, 2006) (Murtagh, J.). The restaurant had argued that they fired the employees for poor performance; however, the lack of documentary evidence to support this defense may have influenced the jury’s decision to treble the plaintiffs’ damages. Id. See also Benoit, No. SUCV2004-3516-B (Mass. Super Ct. Apr. 3, 2009).

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732 M.G.L. ch. 149, § 150.
733 M.G.L. ch. 149, § 150; see, e.g., Killeen, 69 Mass. App. Ct. 784 (finding $153,717 award of attorneys’ fees unreasonable where relationship between fee and results achieved was disproportionate because plaintiff recovered only $1.26 in actual damages).
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