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# Wage & Hour Law in Massachusetts: Pitfalls to Avoid

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# Introductions



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# INDEPENDENT CONTRACTORS v. EMPLOYEES

- In Massachusetts, most people who work or provide services are considered employees (“EEs”) under the law.
- This means that they have rights to minimum wage, overtime, and other protections.
- Employers (“ERs”) who misclassify employees as independent contractors may face criminal enforcement, civil penalties, and civil litigation.
- Remedies in civil litigation include automatic treble damages, and attorneys’ fees under the MA Wage Act.

# THREE-PART TEST

G.L. c. 149, § 148B

(Independent Contractor Statute, “ABC test”)

An employer who wants to treat someone as an independent contractor rather than an employee has to show that the work:

1. Is done without the direction and control over the employer; and
2. Is performed outside the usual course of the employer’s business; and
3. Is done by someone who has their own, independent business or trade doing that kind of work

“The failure to satisfy any prong will result in the individual’s classification as an employee.” *Sebago v. Boston Cab Dispatch, Inc.*, 471 Mass. 321, 327 (2015).



# MASSACHUSETTS WAGE ACT

## M.G.L. C. 149, § 148

- Reuter v. City of Methuen, No. SJC-13121 (Mass. April 4, 2022): SJC held that all Wage Act violations trigger treble damages, regardless of whether the employer remedies the violation prior to the employee filing suit.
- Even employee paid late – for whatever reason and even if remedied – is entitled to three times the amount of the wages in question.
- Former view from lower courts is would only be 3X interest
- Honest payroll errors and good faith disputes over what an EE may be owed are more expensive.

# W&H Liability At A Glance

- FLSA: Civil Action to recover: 1) back pay and 2) equal amount as liquidated damages; 3) plus attorney's fees and court costs
- Similar in CT, ME, NH, RI, VT
- MA: Civil Action to Recover: 1) Unpaid wages and benefits, 2) triple the amount of damages, and 3) attorneys' fees and costs
- *There is typically no good faith defense; MA is absolute strict liability*



# What are “wages” under MA state law?

- Regular weekly wages (to be paid to both exempt and non-exempt employees – including overtime for nonexempt– within six (6) days of the pay period in which they were earned (if employed five or six days in calendar week).
- Timing of payments very important in light of *Reuter*.
- Earned commissions that are “definitely determined, due and payable”
- Accrued Vacation (to be paid on last day of employment for involuntary termination and by next regular pay day for voluntary termination (in absence of regular pay day, on following Saturday))
- *Note “use it or lose it” vacation policy permissible in MA provided (1) adequate notice of policy; (2) enough time to use the accumulated vacation time before ER cut-off date*
- Promised Holiday pay
- Tips if applicable



# “Working Time” under MA Law

- Hours worked (non-exempt employees)
- All time that worker must be on duty at the ER’s worksite or other location;
- Any time worked before or after a normal shift to complete the work, and
- Travel time during the workday (but not ordinary commuting time between home and work)



# Pay Deductions

- ER cannot deduct money from a worker's pay unless the law allows it (such as wage withholding taxes), or the worker asks for a deduction to be made for his or her own benefit (such as to put money aside in the worker's savings account)
- ER cannot take money from a worker's pay for the employer's ordinary business costs (for example: supplies, materials or tools needed for the worker's job)
- Limits on when and how much money an employer can take from a worker's pay for housing and meals the employer gives to the worker
- ER who requires a worker to buy or rent a uniform must pay for the uniform, or promptly refund the actual costs to the worker.



EE of for-profit ER must be paid at least minimum wage for at least 3 hours if he or she:

- Is scheduled to work 3 or more hours;
- Reports to work on time; and
- Is sent home after working less than 3 hours



# Implications for “out of state” employers (particularly relevant for “remote” employees)

- *Wilson v. Recorded Future, Inc., et. al.*, Civil Action No. 1:22-cv-11105-IT (April 19, 2023)
- Federal district court in MA determined even when an employee lives and works out of state, that employee may be in some circumstances still be able to seek relief under the Massachusetts Wage Act.
- Wilson lived in Virginia, not Massachusetts, but argued because significant decisions relating to his employment (compensation plans, commission payments, hiring, and termination) were made in those headquarters, he should be considered a MA employee.
- Court agreed with Wilson denying MTD.
- Implications: Fact that EE does not live or work in MA will not necessarily carry the day.
- If you have a HQ in MA even though 90% of your workforce is out-of-state and remote, your business could face MA Wage Act claims.

# ER Record Keeping Requirements

## Payroll Records

- ER must keep payroll records for 3 years. Payroll records include worker's name, address, jobs/occupation, amount paid each pay period, and hours worked (each day and week)
- Workers have right to see own payroll records at reasonable times and places

## Paystubs - Statement of Pay must say:

- Name of employer and worker
- Date of payment (month, day, and year)
- Number of hours worked during the pay period
- The hourly rate
- All deductions and increases made during the pay period.



# Personnel Records

- A PR is a record kept by an employer that may affect a worker's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action.
- ER must allow EE to review own personal records or receive a copy of their personnel files within 5 (five) business days of a request.
- Employers must notify workers when adding information to the personnel record that could negatively affect an EE's employment.

# MA Earned Sick Time

- MA EST Law requires ER to track accrual and use of earned sick time in most circumstances
- Use if EE is ill or injured or has routine medical appointment. Can also use EST for child, spouse, parent, or spouse's parent for same purposes.
- **Paid or unpaid?** ERs with 11 or more EEs must provide paid EST. ERs with fewer than 11 EEs must provide EST but does not need to be paid.
- EST does not have to be paid out on termination (unlike PTO)



# MA Overtime

- Non-exempt EEs who work more than 40 hours in any week must be paid OT at a rate of at least 1.5 x the regular rate of pay
- Similarities between MA state law and FLSA
- But no “inside sales” exemption in MA
- Federal law provides such an exemption. To qualify, a business must be considered a retail or service establishment and (1) the EE’s regular rate of pay must be equal to at least 1.5 x federal minimum wage and (2) more than half of the EE’s compensation must be derived from commissions.

## *Sullivan v. Sleepy's LLC*, No. SJC-12542 (May 8, 2019)

- Sullivan worked in excess of 40 hours in a week (and on at least one Sunday)
- Sullivan did not receive any additional compensation for the overtime work or Sunday work beyond the recoverable daily draw and any commissions.
- Brought suit alleging violation of MA Wage Act and Overtime Act by not paying OT for hours over 40
- Sleepy's argued Sullivan and other EEs claims offset by commissions and draws received.
- Argued should be able to use commission and draw payments as a credit toward any obligation to pay EEs OT



## *Sullivan v. Sleepy's LLC* (continued)

- SJC held “retroactive allocation of [draws and commissions] is impermissible and that separate and additional overtime is owed.”
- Court stated this is the case even though EEs always received compensation that equaled or exceeded one and ½ times the minimum wage for all overtime hours worked.
- Court also decided EEs should be entitled to OT at rate of one and one-half times minimum wage for all hours worked over 40
- Resulted in wave of class action litigation in MA

- Just recently, MA has adopted new wage transparency requirements for ERs
- 2 distinct wage transparency measures that apply depending on the ER's size: (1) Pay range disclosure requirements, and (2) wage data reporting to the state.
- Governor Healy signed An Act Relative to Salary Range Transparency (Chapter 141 of the Acts of 2024) on July 31, 2024
- Disclosure requirement will take effect on October 29, 2025, one year after the effective date of the act
- Wage reports are due by Feb 1, 2025



# MA Pay Transparency (continued)

- If applicable to ER (applies to public or private ERs with 25 or more EEs in the Commonwealth), ERs must:
  1. Disclose pay ranges in any job posting;
  2. Provide pay ranges to any EE to whom the ER offers a promotion or transfer to a new position with different job responsibilities; and
  3. Upon request, provide the pay range to any applicant or an employee that already holds the position
- Pay range must be set in “good faith” and can be an hourly wage range or annual salary range.



# MA Pay Transparency (continued)

- Wage Data Reporting the State (for private ERs (1) with 100 or more employees in MA; and (2) subject to federal wage data filing requirements.
- The law prescribes the following workflow for wage data reporting, regardless of what category the employer falls into:
  1. A covered employer must submit its wage data report (EEO-1, EEO-3, EEO-4, or EEO-5, as appropriate) for the prior calendar year to the Secretary by Feb. 1. Private employers that file EEO-1 reports must submit their wage data reports annually. Organizations that file EEO-3, EEO-4, and EEO-5 must submit the report every other year.
  2. Each year by April 1, the Secretary must transmit the wage data reports to the Executive Office of Labor and Workforce Development (EOLWD).
  3. Annually by July 1, EOLWD must publish an aggregate wage data report grouped according to North American Industry Classification System (NAICS) code for the applicable industry.



# MA Pay Transparency (continued)

## Anti-Retaliation Protections

- New law contains a provision prohibiting retaliation or discrimination against any employee or applicant because the individual has asserted or exercised any rights provided by law

## Enforcement

- MA attorney general has exclusive authority to enforce both requirements and may obtain injunctive declaratory relief.

## Penalties:

- First offense: a warning
- Second offense: fine up to \$500
- Third offense: fine up to \$1,000
- Fourth and additional offenses: subject to the employer civil citation regime and penalty scale contained in MGL c. 149, sec. 27C(b).



# MA Pay Transparency (continued)

Two primary categories in states:

1. Like MA, require disclosure of salary ranges in job postings or other publicized job description; and those that require disclosure of salary ranges at some point in the hiring process
  - MA joins following “job posting” jurisdictions: California, Colorado, Hawaii, Illinois, Maryland, Washington, D.C. Minnesota, New York, Vermont, and Washington
2. Hiring process
  - Includes Connecticut, Nevada and Rhode Island



# Tipped Wage Question to Appear on MA 2024 Ballot

- Currently, the minimum wage paid to wait staff, other service employees and bartenders is \$6.75 per hour
- Petition would raise the “service rate” from \$6.75 per hour to the full minimum wage (currently \$15 per hour) over five calendar years, beginning Jan. 1, 2025
- 64% of the \$15 minimum wage (or \$9.60) for 2025;
- 73% (or \$10.95) for 2026;
- 82% (or \$12.30) for 2027;
- 91% (or \$13.65) for 2028;
- 100% for 2029

# Tipped Wage Question to Appear on MA 2024 Ballot (continued)

- Petition also proposes significant change to the use of a “tip pool” in restaurant with service employees.
- Currently only “wait staff employees,” “service employees,” and “service bartenders,” sometimes referred to as “front of house” employees are eligible to participate in tip pool.
- Petition would authorize “back of the house” employees to receive tips under tip pool as long as all EEs paid full minimum wage.
- Sharing tips with managers and supervisors would remain prohibited. M.G.L. c. 149, sec. 152(A)(c).



# Thank You

Whether you have a question or want to learn more, we're happy to speak with you.



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