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STATE

Littler on

Massachusetts Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in Massachusetts employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

DISCLAIMER

This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

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1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for

3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see **LITTLER ON CLASSIFYING WORKERS**.

1.1(b) *State Guidelines on Classifying Workers*

In Massachusetts, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. The Massachusetts Independent Contractor Law creates a rebuttable presumption that any person performing services for another is an employee.[5] An employer will only overcome this presumption if it can establish that each of the following three factors is present in the working relationship:

A. the individual is free from control and direction in connection with the performance of the service, both under the individual's contract for the performance of service and in fact;
B. the service is performed outside the usual course of the business of the employer; and
C. the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[6]

The employer bears the burden of proof and, because the conditions are conjunctive, the failure to demonstrate any one of the criteria set forth in the test establishes that the services in question constitute "employment" within the meaning of the statute.[7] The statute excludes far more workers from independent contractor status than are excluded under the traditional state and federal law tests.[8]

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themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] Office of the Att'y Gen. of Mass., *Advisory from the Attorney General's Fair Labor Division on Mass. Gen. Laws ch. 149§ 148B, 2008/1*, *available at* http://www.mass.gov/ago/docs/workplace/independent-contractor-advisory.pdf [hereinafter *Advisory 2008/1*].

[6] MASS. GEN. LAWS ch.149, § 148B(a).

[7] *Rainbow Dev., L.L.C. v. Commonwealth Dep't of Indus. Accidents*, 2005 WL 3543770 (Mass. Super. Ct. Nov. 17, 2005); *see also Advisory 2008/1*, at 2.

[8] The Massachusetts Supreme Judicial Court has held that out-of-state workers may be able to bring claims under the Massachusetts Independent Contractor Law. *See Taylor v. Eastern Connection Operating, Inc.*, 988 N.E.2d 408, 416(Mass. 2013).

In May 2008, the Fair Labor Division of the Massachusetts attorney general's office issued Advisory 2008/1, which offers guidance on the law and is intended to increase employer compliance.[9]

Proving Independent Contractor Status. In one of the first cases interpreting the Independent Contractor Law, a Massachusetts superior court noted that the law is almost identical to the comparable statute used by the Division of Unemployment Assistance, chapter 151A, section 2, and therefore applied case law analyzing chapter 151A, section 2 to the case before it.[10] In Advisory 2008/1, the attorney general also suggested adopting this standard.[11]

Advisory 2008/1 includes Enforcement Guidelines, which identify the following factors as strong indications of misclassification that the attorney general's office will consider sufficient to justify further investigation:

- individuals providing services for an employer that are not reflected on the employer's business records;
- individuals 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 providing services that are not provided Form 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; and
- alleged independent contractors do not pay income taxes or employer contributions to the Division of Unemployment Assistance.[12]

The attorney general's office will evaluate each potential enforcement action on a case-by-case basis.

The Independent Contractor Test: Freedom from Control (the "A" Prong). The first factor of the independent contractor test—freedom from control—is similar to the economic realities test applied by enforcement agencies and courts in interpreting the Fair Labor Standards Act (FLSA) and the Internal Revenue Service (IRS) regulations. To be free from an employer's direction and control, a worker's activities and duties must be carried out with minimal instruction.[13] Control refers both to the results to be accomplished and to the methods used to accomplish the results.[14] By way of example, Advisory

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[9] *Advisory 2008/1*, at 1. Advisory 2008/1 supersedes the attorney general's prior Advisories on this subject.

[10] *College News Serv. v. Department of Indus. Accidents*, 2006 WL 2830971 (Mass. Super. Ct. Sept. 14, 2006). *But see Chaves v. King Arthur's Lounge*, 2009 WL 3188948 , at *1 (Mass. Super. Ct. July 30, 2009) (noting that the unemployment statute is more lenient than the Independent Contractor Law because the unemployment statute "allows employers to prove the second prong by *either* showing that the worker's services are carried out outside the usual course of the employer's business *or* that the service was performed outside of all the places of business of the enterprise") (internal citation omitted).

[11] *Advisory 2008/1*, at 3, *available at* http://www.mass.gov/ago/docs/workplace/independent-contractor-advisory.pdf.

[12] *Advisory 2008/1*, at 5-6.

[13] *Advisory 2008/1*, at 3.

[14] In *Subcontracting Concepts, Inc. v. Commissioner of the Division of Unemployment Assistance*, 19N.E.3d 464 (Mass. App. Ct. 2014), the court observed that, to satisfy this prong, courts look to whether the person performing

2008/1 explains that a worker could exhibit sufficient control over the results and the methods to satisfy the first prong of the test if the worker "completes the job using his or her own approach with little direction and dictates the hours that he or she will work on the job."[15]

The Independent Contractor Test: Service Outside the Usual Course of Employer's Business (the "B" Prong). Typically, the second factor in the independent contractor test—whether the work performed by the worker was outside of the employer's "usual course of business"—poses the greatest challenge and the most confusion for employers.[16] The Advisory states that, for enforcement purposes, "the AGO (The Office of the Attorney General) will consider whether the service the individual is performing is necessary to the business of the employing unit or merely incidental in determining whether the individual may be properly classified as other than an employee under prong two." Even though the Advisory directs that "no prong should be read so broadly as to render the other factors of the test superfluous," many courts have found the "B" prong to be dispositive in misclassification cases.[17] Significantly, the First Circuit Court of Appeals and the Massachusetts Supreme Judicial Court concluded that the Federal Aviation Administration Authorization Act ("FAAAA") preempts the "B" prong as applied to same day messenger companies.[18]

The Independent Contractor Test: Independent Trade, Occupation, or Business (the "C" Prong). The final factor requires that the individual routinely work in an independently established trade, occupation, profession, or business.[19] An important consideration is "whether the nature of the business

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services has the right to control the details of how services are performed and was free from supervision as to the means and methods used to perform the work, and to the results. The court held the alleged employer did not satisfy this prong because it required the individual to check with the company before working for any other carrier, it required the individual to follow the company's delivery routes, and required the individual to wear a shirt bearing the company's logo. Additionally, the company controlled how the individual maintained his vehicle while servicing its customers. Although the individual had some choice concerning the manner in which he made deliveries, the court held the company "had authority to exercise a substantial degree of control over numerous details of the performance." 19 N.E.3d at 468; *see also Commissioner of the Div. of Unemployment Assistance v. Town Taxi of Cape Cod*, 862 N.E.2d 430, 434-35 (Mass. App. Ct. 2007) (cab company did not have control over taxi drivers, who were free to choose which shifts they worked, could refuse to pick up customers, and could engage in independent business activity during their shift).

[15] *Advisory 2008/1*, at 3, *available at* http://www.mass.gov/ago/docs/workplace/independent-contractor-advisory.pdf.

[16] *Advisory 2008/1*, at 6; *see also Oliveira v. ICLB Inc.*, 2010 WL 2102992 (Mass. App. Div. Mar. 30, 2010) (remanding to trial court for further proceedings regarding appellant's status as an employee after determining that, although the appellant would have been an employee under the original test, he may not satisfy the second prong of the Independent Contractor Law, as amended).

[17] *Advisory 2008/1*, at 6; *see also Oliveira v. Advanced Delivery Sys., Inc.*, 2010 WL 4071360 (Mass. Super. Ct. July 16, 2010) (granting partial summary judgment as to misclassification because delivery drivers performed services in the usual course of business of furniture delivery company); *Awuah v. Coverall N. Am., Inc.*, 707 F. Supp. 2d 80, 82-85 (D. Mass. 2010) (granting partial summary judgment based on the second "B" prong, the only prong it "holds dispositive").

[18] *Massachusetts Delivery Ass'n v. Healey*, 821 F.3d 187 (1st Cir. 2016); *Schwann v. FedEx Ground Package Sys., Inc.*, 813 F.3d 429 (1st Cir. 2016); *Chambers v. RDI Logistics, Inc.*, 65 N.E.3d 1 (Mass. 2016).

[19] *Advisory 2008/1*, at 4.

compels the worker to depend on a single employer for the continuation of the services."[20] Also relevant is "whether the worker is an entrepreneur and the service is performed by him or her in that capacity."[21]

Mandatory Treble Damages. The stakes are high for employers trying to comply with the Independent Contractor Law in light of mandated treble damages and attorneys' fees for all wage violations, including violations of the Independent Contractor Law, that were instituted under a 2008 law.[22] The mandate overruled previous legal precedent holding that treble damages were not mandatory for wage law violations, but could be awarded at a judge's discretion. As a result, automatic treble damages and attorneys' fees are available to prevailing parties for wage claims that arose on or after July 13, 2008.[23]

Increased State & Federal Enforcement Efforts. Advisory 2008/1 stresses that proper classification of employees is "of paramount importance to the Commonwealth."[24] The Commonwealth's continued focus on the employee misclassification issue is further evidenced by a broad statewide initiative to increase enforcement of the Independent Contractor Law. In March 2008, then Governor Deval Patrick issued Executive Order No. 499 establishing a Joint Enforcement Task Force on the Underground Economy and Employee Misclassification ("Task Force"). The Task Force was established to coordinate a multi-agency effort to increase compliance with the Independent Contractor Law and other Massachusetts labor laws.

Massachusetts courts also have narrowly construed the Independent Contractor Law and identified new opportunities for recovery under the statute. Taken together with mandatory treble damages for wage-and-hour violations in Massachusetts, strict application of the Independent Contractor Law portends significant potential exposure for employers.[25]

Further, to reduce instances of misclassification of employees as independent contractors, Massachusetts has entered into a partnership with the U.S. Department of Labor, Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts. Under this agreement, the Commonwealth of Massachusetts, Joint Enforcement Task Force on the Underground Economy and Employee Misclassification pledged to share information and to coordinate enforcement efforts with the DOL's Wage and Hour Division, the

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[20] *Coverall v. Division of Unemployment Assistance*, 857 N.E.2d 1083, 1087-88 (Mass. 2006) (applying chapter 151A).

[21] *Boston Bicycle Couriers v. Division of Emp't & Training*, 778 N.E.2d 964, 970 (Mass. App. Ct. 2002) (applying chapter 151A); *see also Advisory 2008/1*, at 4; *Subcontracting Concepts, Inc. v. Commissioner of the Div. of Unemployment Assistance*, 19 N.E.3d 464, 469 (Mass. App. Ct. 2014).

[22] MASS. GEN. LAWS ch. 149, § 150; *see also* An Act Further Regulating Employee Compensation, 2008 Mass. Acts, ch. 80 (2008), *available at* https://malegislature.gov/Laws/SessionLaws/Acts/2008/Chapter80.

[23] *Rosnov v. Molloy*, 952 N.E.2d 901 (Mass. 2011).

[24] *Advisory 2008/1*, at 1.

[25] For example, the state Supreme Judicial Court found that the independent contractor statute also applies to the franchisor-franchisee relationship and therefore, a franchisee providing services to a franchisor under the terms of a franchise agreement may be classified as an employee of the franchisor under state wage-and-hour law. However, the court noted that this does not "render every franchisee an employee" under state law, citing numerous examples where even under the first control prong of the ABC test, franchisees were found to *not* be employees of the franchisor. *Patel v. 7-Eleven, Inc.*, 183 N.E.3d 398, 17-18 (Mass. 2022).

Occupational Safety and Health Administration, the Employee Benefits Security Administration, and the Office of Federal Contract Compliance Programs.[26]

Other State Tests. The distinction between an independent contractor and employee under various state laws is outlined in Table 1 below. The table notes state laws that incorporate or rely on the Massachusetts Independent Contractor Law.

Table 1. Other State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	Massachusetts Commission Against Discrimination (MCAD)	Common-law test.[27] One court considered the following factors, which focus on the right to control: • Is there a contract for the performance of specified work? • Does the worker operate a distinct business? • Does the worker furnish materials or hire helpers? • Is the job a special assignment rather than an integral part of the employer's business? • Is the worker paid by the job rather than by the hour? • Does the worker receive benefits? • Does the work require special skill? • Is the work the kind that is normally performed without direction from the employer? • Is the employment temporary or is there an ongoing relationship? • Does the worker have the opportunity to make a profit or sustain a loss?"[28]
Income Taxes	Massachusetts Department	IRS twenty-factor test.[29]

[26] U.S. Dep't of Labor, Wage and Hour Div. & Commonwealth of Mass. Exec. Office of Labor & Workforce Dev., *Common Interest Agreement* (Nov. 17, 2014), *available at* https://www.dol.gov/whd/workers/MOU/ma_1.pdf.

[27] MASS. GEN. LAWS ch. 151B.

[28] *Weston v. Town of Middleborough*, 2002 WL 243197, at **6-7 (Mass. Super. Ct. Feb. 15, 2002) ("While there are no hard and fast criteria set out by statute or regulation, the MCAD and the courts have adopted a functional approach to determine who is an independent contractor.").

[29] Massachusetts Dep't of Rev., *Tech. Info. Rel. 05-11: Effect of New Employee Classification Requirements Under G.L. c. 149, § 148B on Withholding of Tax on Wages Under G.L. c. 62B* (Sept. 13, 2005), *available at* https://www.mass.gov/technical-information-release/tir-05-11-effect-of-new-employee-classification-

Table 1. Other State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
	of Revenue	
Unemployment Insurance	Executive Office of Labor and Development, Department of Unemployment Insurance	The Massachusetts Independent Contractor Law test applies, discussed above.[30]
Wage & Hour Laws	Massachusetts Attorney General, Fair Labor Division	The Massachusetts Independent Contractor Law test applies, discussed above.
Workers' Compensation	Executive Office of Labor and Workforce Development, Department of Industrial Accidents	The Supreme Judicial Court of Massachusetts has held that the Massachusetts Independent Contractor Law test does not apply for the purposes of workers' compensation.[31] Instead, the Court applied the definition of *employee* found in the workers' compensation statute, which includes: "every person in the service of another under any contract of hire, express or implied, oral or written" with certain exceptions.[32] In determining whether an individual is an employee under this definition, courts consider the following factors: • extent of control, under the contract, exercised by the master over the details of the work; • whether or not the worker has a distinct occupation or business; • the kind of occupation, including whether, in that locality, the work is usually done

requirements-under-gl. In Technical Information Release 05-11, the Massachusetts Department of Revenue makes clear that the Massachusetts Independent Contractor Law does not amend the standard used by the Department for purposes of determining independent contractor/employee status. The Department of Revenue also indicates that it will accept IRS determinations of worker status for Massachusetts withholding purposes; see also *Ives Camargo's Case*, 96 N.E.3d 673 (Mass. 2018) (noting that the Department of Revenue applies the Internal Revenue Code's 20-factor analysis to determine employment status).

[30] MASS. GEN. LAWS ch. 151A, § 2 ("The failure to withhold federal or state income taxes or to pay workers compensation premiums with respect to an individual's wages shall not to be used for the purposes of making a determination under this section [covering unemployment insurance].").

[31] *Ives Camargo's Case*, 96 N.E.3d 673 (Mass. 2018).

[32] MASS. GEN. LAWS ch. 152, § 1(4).

Table 1. Other State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		under the direction of an employer or by a specialist without supervision; • the skill required; • which party supplies the instrumentalities, tools, and the place of work; • the length of time for which the person is employed; • the method of payment, whether by time or by job; • whether the work is a part of the regular business of the employer; • whether the parties believe they are creating a master and servant relationship; • whether the principal is or is not in business; • the tax treatment applied to payment; and • the presence of the right to terminate the relationship without liability, as opposed to the worker's right to complete the project.[33]
Workplace Safety	Not applicable	There are no relevant statutory definitions or case law identifying a test for independent contractor status. Massachusetts does not have an approved state plan under the federal Occupational Safety and Health Act.

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

[33] *Whitman's Case*, 952 N.E.2d 983, 987-88 n.3 (Mass. App. Ct. 2011) (citing *Mactavish v. O'Connor Lumber Co.*, 6 Mass. Workers' Comp. Rep. 174, 177 (Bd. Dep't of Indus. Accidents 1992)).

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[34]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[35] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[36]

For more information on these topics, see **LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS**.

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

1.2(b)(i) *Private Employers*

All Massachusetts employers are prohibited from knowingly employing unauthorized aliens. *Unauthorized alien* is defined as an alien who, at the time of employment, is not lawfully admitted into or otherwise permitted to work in the United States by the U.S. Citizenship and Immigration Services (USCIS)[37] or the U.S. Attorney General.

That being said, an employer will not be in violation of Massachusetts law if it made a *bona fide* inquiry to verify an alien's employment eligibility. An inquiry into employment status will be deemed *bona fide* if the employer completes and retains Form I-9 together with supporting documentation. When completing Form I-9, the employer must examine all documents provided and may accept all documents that reasonable appear to be related to the person submitting them and to be genuine and free of tampering, alterations, or desecration.[38]

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[34] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see **LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS**.

[35] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[36] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

[37] Formerly referred to as the U.S. Immigration and Naturalization Services.

[38] MASS. GEN. LAWS ch. 149, § 19C; 453 MASS. CODE REGS. 3.01, 3.03.

Employers are not required to retain documentation supporting employment eligibility. However, an employer will have a defense to a claim of employing unauthorized aliens if it completes and retains Form I-9 together with supporting documentation for each employee.[39] Thus, while Massachusetts employers are encouraged to use an electronic verification system, including E-Verify, they are not mandated to do so.

1.2(b)(ii) *State Contractors*

State agencies may not use undocumented workers to perform state contracts. As a condition of receiving funds under a public contract, a contractor must certify that it:

- will not knowingly use undocumented workers in connection with the performance of the contract;
- verifies the work authorization of all workers "pursuant to federal requirements" and without engaging in unlawful discrimination; and
- will not knowingly or recklessly alter, falsify, or accept altered or falsified documents from any worker.[40]

1.2(b)(iii) *State Enforcement, Remedies & Penalties*

Employers that violate the provisions regarding the employment of unauthorized aliens may be fined.[41]

State Contractors. Breach of the certifications during the contract period is considered a material breach subjecting the contractor to sanctions, including monetary penalties, withholding payments, and contract suspension or termination.[42]

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[43] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers

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[39] 453 MASS. CODE REGS. 3.03.

[40] Mass. Exec. Order No. 481 (Feb. 23, 2007), *available at* https://www.mass.gov/executive-orders/no-481-order-prohibiting-the-use-of-undocumented-workers-on-state-contracts. The Executive Order contemplates that employers are required to verify all workers on a state contract using Form I-9, even those classified as independent contractors, and even though such verification is not required by state law. Employers required to verify the eligibility of independent contractors should confer with counsel concerning implications of requiring independent contractors to execute an employment-based I-9 Form.

[41] MASS. GEN. LAWS ch. 149, § 19C.

[42] Mass. Exec. Order No. 481 (Feb. 23, 2007), *available at* https://www.mass.gov/executive-orders/no-481-order-prohibiting-the-use-of-undocumented-workers-on-state-contracts.

[43] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.

5. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.3(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

Under the Massachusetts fair employment practices law, employers with six or more employees may not inquire into or use criminal records of any arrest, detention, or disposition that did not result in conviction.[44] Employers are further prohibited from discriminating against an applicant or employee who refuses to provide information about arrests.[45] It is also illegal for an employer to request that an applicant or employee provide a copy of a probation or arrest record, or to ask an applicant or employee to sign a release permitting access to such information.[46]

State Ban-the-Box Law

Massachusetts's ban-the-box law, which is part of the fair employment practices law, places additional restrictions on preemployment background screening practices for employers with six or more employees. On its initial written application form, a covered employer may not request criminal offender record information unless: (1) the applicant is applying for a position for which any federal or state authority creates a mandatory or presumptive disqualification based on certain types of convictions; or (2) the employer is subject to a federal or state obligation not to employ persons in one

[44] MASS. GEN. LAWS ch. 151B, § 1.

[45] MASS. GEN. LAWS ch. 151B, § 4(9) ("No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold."); 804 MASS. CODE REGS. 3.02.

[46] Massachusetts Comm'n Against Discrimination, *Criminal Record Discrimination in the Workplace*, *available at* https://www.mass.gov/service-details/criminal-record-discrimination-in-the-workplace.

or more positions who have been convicted of certain offenses.[47] This prohibition only applies to the initial written employment application.[48]

Further, it is unlawful in Massachusetts for an employer to require a person to provide a copy of their criminal record.[49]

An employer may ask an applicant about the applicant's criminal record—subject to the other provisions discussed here—and may take adverse action based on the record. However, an employer that is in possession of an applicant's criminal offender record information must provide the applicant with the criminal history record prior to questioning the applicant about the applicant's criminal history, regardless of where the employer obtained the information. If the employer makes an adverse decision on the basis of criminal history, the employer must provide the applicant with the criminal history, if it has not already been provided.[50]

Other Guidelines. As a general rule, an employer may seek information which is directly related to the applicant's ability to perform the job for which they are applying. An employer may not make inquiries if the response is likely to disclose the applicant's protected class status.[51] According to the Massachusetts Commission Against Discrimination (MCAD), which enforces the ban-the-box law, an employer with six or more employees may not ask about, maintain a record of, or base any employment decision on the following information:

1. arrests or prosecution that did not lead to a conviction;
2. a first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace;
3. misdemeanors where the date of conviction or the end of any period of incarceration was more than three years ago, provided that there have been no subsequent convictions within those three years;
4. any record of a court appearance which has been sealed under state law; and
5. anything pertaining to juvenile records, including delinquency and child in need of services complaints, unless the child was tried as an adult in Superior Court.[52]

Requirement for Application Forms. When permitted, applications seeking information regarding prior arrests or convictions must include the following statement:

> An applicant for employment with a sealed record on file with the commissioner of probation may answer "no record" with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. In addition, any applicant for employment may answer "no record" with respect to any inquiry relative to prior

[47] MASS. GEN. LAWS ch. 151B, § 4(9 1/2).

[48] MASS. GEN. LAWS ch. 151B, § 4(9 1/2).

[49] MASS. GEN. LAWS ch. 6, § 172.

[50] MASS. GEN. LAWS ch. 6, § 171A.

[51] 804 MASS. CODE REGS. 3.02.

[52] Massachusetts Comm'n Against Discrimination, *Criminal Record Discrimination in the Workplace*, *available at* https://www.mass.gov/service-details/criminal-record-discrimination-in-the-workplace.

arrests, court appearances or adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution.[53]

Policy Requirement. An employer that conducts five or more criminal background investigations per year, regardless of where the information is obtained, must maintain a written criminal offender record information policy. The policy must explain that the employer will notify applicants of any potential adverse decision based on the criminal offender record information, will disclose a copy of that information and the policy to the applicant, and will also provide information concerning the process of correcting a criminal record.[54]

Local Law. Under the Boston Human Rights Ordinance, it is an unlawful discriminatory practice for an employer with six or more employees within the City of Boston to refuse to hire, employ, classify, upgrade, bar, discharge, or otherwise discriminate from employment against any person because of ex-offender status, unless based upon a bona fide occupational qualification.[55] *Ex offender status* includes the following:

1. any arrest, detention, or accusation of any violation of law in which no conviction resulted, or
2. a final conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbing the peace, or
3. any conviction of a misdemeanor where the date of such conviction or completion of any period of incarceration resulting therefrom, which ever date is later, occurred five or more years prior to application for employment.[56]

Bona fide occupational qualification is defined as a valid consideration which is a requirement for employment and has been certified as such by the Commission or by the Massachusetts Commission Against Discrimination under Chapter 151B of the Massachusetts general Law.[57] If an employer relies on a qualification that has not been certified, the employer has burden of showing that the discrimination is in fact a necessary result of a bona fide occupational qualification and that there exists no less discriminatory means of satisfying the occupational qualification.[58]

1.3(a)(iii) *State Guidelines on Employer's Use of Conviction Records*

As noted in **1.3(a)(ii)**, employers with six or more employees are prohibited from using or inquiring into any conviction that is:

- a first conviction for certain misdemeanors (*i.e.*, drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace); or

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[53] MASS. GEN. LAWS ch. 276, §§ 100A, 100C.

[54] MASS. GEN. LAWS ch. 6, § 171A.

[55] BOSTON, MASS., MUNI. CODE §§ 12-9.3, 12-9.4.

[56] BOSTON, MASS., MUNI. CODE § 12-9.2.

[57] BOSTON, MASS., MUNI. CODE § 12-9.2.

[58] BOSTON, MASS., MUNI. CODE §§ 12-9.3, 12-9.4.

- any conviction of a misdemeanor where the date of the conviction or completion of incarceration, whichever is later, occurred three or more years prior to the date of application or request for information, unless the person has been convicted of any offense within the five years preceding the date of application or request for information.

Employers are also prohibited from discriminating against an applicant or employee who refuses to provide information about these convictions.[59]

Other Guidelines. The MCAD Guidelines state that an employer may ask: (1) "Have you ever been convicted of a felony?" and (2) "Within the last five years have you been convicted of, or released from incarceration for a misdemeanor which was not a first offense for drunkenness, simple assault, speeding, a minor traffic violation, an affray, or disturbing the peace?"[60] The employer may then ask "if the answer to the above question is yes, please state whether you were convicted more than five years ago for any offense which was not a first offense for drunkenness, simple assault, speeding, a minor traffic violation, affray, or disturbing the peace?"[61]

For additional information on Massachusetts and Boston law on preemployment criminal background screening practices, see **1.3(a)(ii)**.

1.3(a)(iv) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

As noted in **1.3(a)(ii)**, employers may not inquire into or use any criminal record that is sealed. Moreover, an applicant for employment with a sealed record may respond "no record" to any inquiries, as though the arrest, criminal court appearances, or other adjudication did not occur.[62]

In addition, employers of six or more employees cannot request any information, use any form of employment application that requests such information, or exclude, limit or otherwise discriminate against any person due to that person's failure to furnish such information through a written application or oral inquiry or otherwise, regarding a criminal record or anything related to a criminal record that has been sealed or expunged.[63] An employer must include a disclaimer in an employment application that states that a person with expunged criminal records may answer "no record" in response to an inquiry on the employment application with respect to the expunged records.[64]

Juvenile Records. Employers may not ask about or use any information pertaining to juvenile records, including delinquency and child in need of services complaints, unless the child was tried as an adult in Superior Court.[65]

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[59] MASS. GEN. LAWS ch. 151B, § 4(9); 804 MASS. CODE REGS. 3.01, 3.02.

[60] Massachusetts Comm'n Against Discrimination, *Employment Discrimination on the Basis of Criminal Record*, *available at* https://www.mass.gov/service-details/criminal-record-discrimination-in-the-workplace.

[61] 804 MASS. CODE REGS. 3.01, 3.02; *see also* Massachusetts Comm'n Against Discrimination, *Employment Discrimination on the Basis of Criminal Record*.

[62] MASS. GEN. LAWS ch. 276, §§ 100A, 100C.

[63] MASS. GEN. LAWS ch. 151B, § 4(9).

[64] MASS. GEN. LAWS ch. 276, § 100N(b).

[65] Massachusetts Comm'n Against Discrimination, *Employment Discrimination on the Basis of Criminal Record*.

For additional information on Massachusetts law on preemployment criminal background screening practices, including the requirement to include a statement on sealed records on employment applications, see **1.3(a)(ii)**.

1.3(a)(v) *State Enforcement, Remedies & Penalties*

Employers that violate the fair employment practices law may be found liable for civil penalties, and sued for damages, injunctive relief, or both.[66]

An employer that fails to provide criminal offender record to an applicant in connection with making any employment decision based on that history may be subject to hearings and sanctions by the criminal record review board.[67]

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[68] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[69] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions

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[66] MASS. GEN. LAWS ch. 151B, §§ 5, 9.

[67] MASS. GEN. LAWS ch. 6, § 171A.

[68] 15 U.S.C. §§ 1681 *et seq*.

[69] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[70]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

Under Massachusetts's mini-FCRA law, employers can use consumer reports for employment purposes.[71] A *consumer report* is defined "as any written, oral or other communication of any information by a consumer reporting agency bearing on an [individual's] credit worthiness, credit standing or credit capacity which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the [individual's] eligibility" for employment purposes.[72] *Employment purposes*, in this context, refers to "a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee."[73]

The law imposes obligations on employers with respect to investigative consumer reports. *Investigative consumer report* means a consumer report (in whole or in part) that includes information on an individual's "character, general reputation, personal characteristics, or mode of living" where that information has been obtained "through personal interviews with neighbors, friends, or associates" of the subject individual "or with others with whom he [or she] is acquainted or who may have knowledge concerning any such items of information."[74] This definition does not include specific factual information on an individual's credit record "obtained directly from a creditor . . . or from a consumer reporting agency" if it was acquired directly from the creditor or the individual.[75]

An employer cannot procure or cause to be prepared an investigative consumer report without prior disclosure and consent. Specifically, the employer must clearly and accurately disclose in writing, prior to requesting the report, that "an investigative consumer report commonly includes information as to the [individual's] character, general reputation, personal characteristics, and mode of living, and the disclosure includes the precise nature and scope of the investigation requested and the right to have a copy of the report upon request."[76] For current employees, notification in an employment manual is sufficient. Additionally, no report may be sought unless the subject individual provides written permission prior to the employer requesting the report.[77]

Adverse Action. Whenever employment is denied or terminated based on a consumer report, an employer must, within 10 business days of its decision to deny or terminate employment, notify the individual in writing. The notice must be in a clear and conspicuous format, no smaller than ten-point type, and must contain the name, address, and toll-free telephone number of any consumer reporting agency that provided any report that was reviewed or otherwise taken into account when effectuating

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[70] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

[71] MASS. GEN. LAWS ch. 93, § 51(a)(3)(ii).

[72] MASS. GEN. LAWS ch. 93, § 50.

[73] MASS. GEN. LAWS ch. 93, § 50.

[74] MASS. GEN. LAWS ch. 93, § 50.

[75] MASS. GEN. LAWS ch. 93, § 53.

[76] MASS. GEN. LAWS ch. 93, § 53(a).

[77] MASS. GEN. LAWS ch. 93, §§ 53, 60.

the adverse action. Furthermore, this notice must inform the individual of the individual's rights in substantially the following manner:

> You have the right to obtain a free copy of your credit report within sixty days from the consumer credit reporting agency which has been identified on this notice. The consumer credit reporting agency must provide someone to help you interpret the information on your credit report. Each calendar year you are entitled to receive, upon request, one free consumer report.
> You have the right to dispute inaccurate information by contacting the consumer credit reporting agency directly. If you have notified a consumer credit reporting agency in writing that you dispute the accuracy of information in your file, the agency must then, within thirty business days, reinvestigate and modify or remove inaccurate information. The consumer credit reporting agency may not charge a fee for this service.
> If reinvestigation does not resolve the dispute to your satisfaction, you may send a statement to the consumer credit reporting agency, to be kept in your file, explaining why you think the record is inaccurate. The consumer credit reporting agency must include your statement about the disputed information in a report it issues about you.[78]

1.3(b)(iii) *State Enforcement, Remedies & Penalties*

An employer that willfully fails to comply with the Massachusetts's mini-FCRA provisions is liable to the affected applicant or employee for actual damages, punitive damages, and, in the case of any successful enforcement action, costs and reasonable attorneys' fees.[79]

An employer that negligently fails to comply with the provisions is liable to the affected applicant or employee in an amount equal to the sum of any actual damages, as well as for costs and attorneys' fees if the action is successful.

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.

[78] MASS. GEN. LAWS ch. 93, § 62.

[79] MASS. GEN. LAWS ch. 93, § 63.

- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

Massachusetts law contains no express provisions regulating employer access to applicants' or employees' social media accounts.

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[80] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see LITTLER ON EMPLOYMENT TESTING.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

In Massachusetts, employers or their agents cannot:

- subject any employee or applicant to, or request such person to take a lie detector test, either inside or outside of Massachusetts; or

[80] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

- discharge, not hire, demote, or otherwise discriminate against an applicant or employee for asserting the employee's rights under the law.[81]

There are no exceptions applicable to private employers.[82]

A *lie detector test* is defined as "any test utilizing a polygraph or any other device, mechanism, instrument or written examination," which is administered or "interpreted by an examiner for the purpose of purporting to assist in or enable the detection of deception, the verification of truthfulness, or the rendering of a diagnostic opinion regarding the honesty of an individual."[83]

Requirement for Employment Applications. In addition, employment applications in Massachusetts must contain the following notice in clearly legible print: "It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer that violates this law shall be subject to criminal penalties and civil liability."[84]

An employer may use the results of a previous, lawfully-administered test in making a hiring determination.[85]

1.3(d)(iii) *State Enforcement, Remedies & Penalties*

A violation of the restrictions on polygraph examinations is punishable by a fine. Second and subsequent violations are punishable by a fine, up to 90 days' imprisonment, or both. In the case of a corporation, the responsible individual will be the president, chief operating officer, or any managerial or supervisory person who allows or condones a violation.[86]

A waiver of the provisions by an employee or applicant is not a defense to criminal prosecution or civil liability. An aggrieved individual can file a private lawsuit, individually or on behalf of other similarly situated individuals, for injunctive relief and damages, including treble damages for any loss of wages or other benefits. If successful, reasonable attorneys' fees and litigation costs can be recovered.[87]

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation

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[81] MASS. GEN. LAWS ch. 149, § 19B(2); 804 MASS. CODE REGS. 3.02.

[82] MASS. GEN. LAWS ch. 149, § 19B(2). The only exception is for lie detector tests administered by law enforcement agencies as otherwise permitted in criminal investigations. MASS. GEN. LAWS ch. 149, § 19B(2).

[83] MASS. GEN. LAWS ch. 149, § 19B(1).

[84] MASS. GEN. LAWS ch. 149, § 19B(2)(b).

[85] *See Saliba v. City of Worcester*, 87 N.E.3d 100 (Mass. App. Ct. 2017) (employer lawfully viewed and considered plaintiff's lie detector test results from a test administered several years earlier for a job plaintiff applied for in Connecticut).

[86] MASS. GEN. LAWS ch. 149, § 19B(3).

[87] MASS. GEN. LAWS ch. 149, § 19B(3)-(4).

industries.[88] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[89] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see **LITTLER ON EMPLOYMENT TESTING**.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

Massachusetts law contains no express provisions regulating preemployment drug or alcohol testing by private employers. However, Massachusetts has codified a right to privacy in the Massachusetts Privacy Act,[90] which requires a balancing of the employer's legitimate business interest in an intrusion against the substantiality of the intrusion on an employee's reasonable expectation of privacy.[91] For a discussion of this balancing act in relation to drug and alcohol testing of employees, see **3.2(b)(ii)**.

1.3(f) *Additional State Guidelines on Preemployment Conduct*

1.3(f)(i) *State Restrictions on Job Application Fees, Deductions, or Other Charges*

Any employer that requests or requires that an employee or prospective employee undergo a medical examination by a physician designated by the employer, as a condition to securing or continuing in employment, must reimburse the applicant or employee for the medical expenses.[92]

1.3(f)(ii) *State Restrictions on Inquiries Regarding Salary History*

The Massachusetts Act to Establish Pay Equity seeks to ensure equal pay. Among other things, and as discussed in more detail in **3.11(b)(ii)**, it is illegal for an employer to pay employees at a lower rate than the rate paid to employees of a different gender for comparable work.

Under the Act, it is prohibited for an employer to:

- require that an employee refrain from inquiring about, discussing, or disclosing information about the employee's own wages, or any other employee's wages;
- screen job applicants based on their wages;
- request or require an applicant to disclose prior wages or salary history; or

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[88] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[89] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[90] MASS. GEN. LAWS ch. 214, § 1B.

[91] *See Bratt v. I.B.M. Corp.*, 467 N.E.2d 126, 133-34 (Mass. 1984).

[92] MASS. GEN. LAWS ch. 149, § 159B.

- seek the salary history of any prospective employee from any current or former employer, unless the prospective employee provides express written consent, and an offer of employment—including proposed compensation—has been made.[93]

If an applicant has voluntarily disclosed their wage or salary history information, the employer may confirm the applicant's prior wages or salary or permit the applicant to confirm prior wages or salary. The information will qualify as "voluntarily disclosed" if a reasonable person in the prospective employee's position would not think, based on the employer's words or actions, that the employer suggested or encouraged the disclosure. In addition, an employer may ask about a prospective employee's salary requirements or expectations.[94]

1.3(f)(iii) *State Restrictions on HIV Testing*

A Massachusetts employer is prohibited from requiring an HIV antibody or antigen test as a condition of employment.[95]

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[96] and a cost-sharing reduction

[93] MASS. GEN. LAWS ch. 149, § 105A; Massachusetts Office of the Attorney General, *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, available at http://www.mass.gov/files/documents/2018/03/01/AGO%20Equal%20Pay%20Act%20Guidance.pdf.

[94] MASS. GEN. LAWS ch. 149, § 105A; Massachusetts Office of the Attorney General, *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, available at http://www.mass.gov/files/documents/2018/03/01/AGO%20Equal%20Pay%20Act%20Guidance.pdf.

[95] MASS. GEN. LAWS ch. 111, § 70F.

[96] 26 U.S.C. § 36B.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	under section 1402 of the Patient Protection and Affordable Care Act[97] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[98] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[99]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[100] Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[101]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[102] In either case,

[97] 42 U.S.C. § 18071.

[98] 29 U.S.C. § 218b.

[99] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[100] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[101] 29 C.F.R. § 2590.606-1.

[102] 29 C.F.R. § 825.300(a).

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[103] Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[104]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[105] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[106]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[107]

[103] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

[104] 29 C.F.R. § 825.300(a).

[105] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[106] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[107] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[108]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents	Under Massachusetts's new paid family and medical leave law, covered employers must provide each existing and new employee a notice that explains an employee's rights and obligations under the law, including both the employee's and the employer's tax contributions and instructions on how to file a claim for benefits. Employers must provide this notice to every employee in the employee's primary language. This includes all MA W-2 employees. As well, if more than 50 percent of an employer's workforce is made up of MA 1099-MISC contractors, the employer is required to inform them of PFML benefits and protections in the same as MA W-2 employees. Thereafter, employers must provide this notice to new employees not more than 30 days from the beginning date of the employee's employment. Employers may use one of the model notices provided by Department of Family and Medical Leave (DFML) or create their own. Either way, the notice must be provided in an employee's primary language. For an employer that wishes to create its own notice, at a minimum, the notice must state the following: • an explanation of the availability of family and medical leave benefits, including the right to reinstatement and continuation of health insurance;

[108] 29 C.F.R. § 531.59.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	• the employer's contribution amount and obligations; • the employee's contribution amount and obligations; • the employer's name and mailing address; • the identification number assigned to the employer by the DFML; • instructions on how to file a claim for family and medical leave benefits; • the DFML mailing address, email address and telephone number; and, • any other information deemed necessary by the DFML. Delivery of the written notice occurs when an employee or self-employed individual provides written acknowledgement of receipt of the information, or signs a statement indicating their refusal to sign such acknowledgement. Notice may be provided electronically, and acknowledgments may be in paper or electronic form as well. In the event that an employee or self-employed individual fails to acknowledge receipt, the DFML will consider an employer or covered business entity to have fulfilled its notice obligation if it can establish that it provided to each member of its current workforce notice and the opportunity to acknowledge or decline to acknowledge receipt. Employers or covered business entities will be subject to all Section 4 requirements for employees or self-employed individuals who are employed or contracted with on or after October 1, 2019. Note: The identification number assigned by the Department of Family and Medical Leave will be the employer's Federal Employer Identification Number (FEIN). Employers should use the FEIN as the Employer ID Number on the "Employer Notice to Employee" and the "Employer Notice to Self-Employed Individual" Forms.[109]
Fair Employment Practices Documents: Sexual Harassment	At the time of employment, employers with six or more employees must provide new employees a written copy of the employer's policy against sexual harassment. The policy must include: • a statement that sexual harassment in the workplace is unlawful; • a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of such a complaint;

[109] MASS. GEN. LAWS ch. 175M, § 4(a). There are various model notices available from DFML, including for W-2 workers and eligible 1099-MISC workers, and in several languages at https://www.mass.gov/info-details/pfml-workforce-notifications-and-rate-sheets-for-massachusetts-employers.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	• a description of, and examples of, sexual harassment; • a statement of the range of consequences for employees who are found to have committed sexual harassment; • a description of the process for filing internal complaints about sexual harassment, as well as the work addresses and telephone numbers of the individual(s) to whom complaints should be made; and • the identity of appropriate state and federal employment discrimination enforcement agencies, and directions on how to contact them.[110]
Fair Employment Practices: Massachusetts Pregnant Workers' Fairness Act	The Massachusetts Pregnant Workers' Fairness Act requires an employer of six or more employees to provide written notice of the right to be free from discrimination in relation to pregnancy or a condition related to the employee's pregnancy, including the right to reasonable accommodations for conditions related to pregnancy. The employer must distribute the notice in a handbook or by other means to: • new employees at or prior to the commencement of employment; and • an employee who notifies the employer of a pregnancy or an employee who notifies the employer of a condition related to the employee's pregnancy including, but not limited to, lactation, or the need to express breast milk for a nursing child, within 10 days of such notification.[111]
Tax Documents	Employees, on or before the date employment begins, must furnish employers with a signed withholding exemption certificate setting forth the number of dependency exemptions which they claim.[112]
Wage & Hour	An employer may pay the service rate (*i.e.*, take a tip credit and pay

[110] MASS. GEN. LAWS ch. 151B, § 3A. A model sexual harassment policy (MCAD Policy 96-2) is available from the Massachusetts Commission Against Discrimination at https://www.mass.gov/doc/model-sexual-harassment-policy/download. Additional resources are available at http://www.mass.gov/mcad/resources/employers-businesses/emp-guidelines-harassment-gen.html. Some exceptions apply for this requirement, including for nonprofit social clubs.

[111] MASS. GEN. LAWS ch. 151B, § 4(1E)(d).

[112] MASS. GEN. LAWS ch. 62B, § 4. The Massachusetts Department of Revenue provides online Form M-4 (Massachusetts Employees Withholding Exemption Certificate), available at https://www.mass.gov/doc/form-m-4-massachusetts-employees-withholding-exemption-certificate/download. Additional forms are available at http://www.mass.gov/dor/forms/online-forms-index.html.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Documents: Tipped Employees	minimum cash wage) to the employee only if it has informed the employee of the tipped employee provisions,[113] and satisfied other requirements.[114]
Workers' Compensation Documents	Every insured employer must, as soon as it secures a policy, give written or printed notice to all persons under contract of hire that it has provided for payment to injured employees by the insurer, or by self-insurance, as provided by this chapter.[115]
Noncompete Agreements	The Massachusetts Noncompetition Agreement Act ("the Act") applies to all noncompetition agreements entered into on or after October 1, 2018. Under the Act, if a noncompetition agreement is entered into in connection with the beginning of employment, it must be in writing and signed by both the employer and employee and expressly state that the employee has the right to consult with counsel prior to signing. Employers must provide notice of a noncompetition agreement to a prospective employee by the earlier of a formal offer of employment, or at least 10 business days before the start of employment. If the agreement is entered into after commencement of employment, but not in connection with the separation from employment, it must be supported by fair and reasonable consideration independent from the continuation of employment, and notice of the agreement must be provided at least 10 business days before the agreement is to be effective. Moreover, the agreement must be in writing and signed by both the employer and employee and expressly state that the employee has the right to consult with counsel prior to signing.[116]

[113] MASS. GEN. LAWS ch. 151, § 7. Employers must create their own form to satisfy this requirement.

[114] 454 MASS. CODE REGS. 27.03.

[115] MASS. GEN. LAWS ch. 152, §§ 21, 22. Notice is available at https://www.mass.gov/doc/poster-notice-to-employees-english/download. It is also available in Arabic, Cape Verdean Creole, Chinese, Haitian Creole, Khmer, Portuguese, Spanish, and Vietnamese at https://www.mass.gov/service-details/notice-to-employees-poster.

[116] MASS. GEN. LAWS ch. 149, § 24L.

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[117] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[118]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;

[117] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

[118] 42 U.S.C. § 653a.

- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[119] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of Massachusetts's new hire reporting law.[120]

Who Must Be Reported. Massachusetts employers must report employees who are: (1) newly-hired employees who work in the state; (2) individuals returning to payroll after a lapse in pay of 30 calendar days or more; and (3) newly-hired independent contractors who the employer expects to pay $600 or more over the course of the year.

Report Timeframe. Massachusetts employers must submit new hire information for employees within 14 days of the hiring date.

Information Required. Employers must report the employee's or independent contractor's name, address, Social Security number, and the date the individual started working or was reinstated. To accompany this information, the employer must also supply its name, address, and federal employer identification number.

In addition, Massachusetts requires quarterly reports containing the following information for each employee: (1) name; (2) Social Security number; (3) wages paid; (4) hours worked; (5) total amount of taxes withheld and the amount of wages upon which the withholding was based; (6) the identification number assigned the employer by the division; (7) the corresponding federal employer identification number; and (8) the identification number the employer is required to include on withholding tax returns. The report also must include the count of all employees who worked during or received wages for the pay period, which includes the twelfth day of each month of the applicable quarter.

[119] HHS offers the form online at http://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[120] MASS. GEN. LAWS ch. 62E, § 2; 830 MASS. CODE REGS. 62E.2.1.

Form & Submission of Report. The information should be submitted via the Massachusetts Employer New Hire Reporting Form. Reports may be submitted by fax, mail, over the internet, electronically, or magnetically.

Location to Send Information.

Massachusetts Department of Revenue
P.O. Box 55141
Boston, MA 02205-5141
(800) 332 2733
(617) 660-1234
(617) 376-3262 (fax)
http://www.mass.gov/dor/child-support/employers/new-hire-reporting/

Multistate Employers. Employers that have employees employed in Massachusetts and in one or more other states may designate a single state as the state to which the employer will send all reports of new employees. Multistate employers that elect to report to Massachusetts must comply with the federal new hire requirements, as well as the pertinent Massachusetts regulations.[121] Multistate employers must report using a form and means of transmittal prescribed by the state commissioner.

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after the individual's employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[122] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing

[121] *See* 42 U.S.C. § 653a(b)(1)(B).

[122] 18 U.S.C. §§ 1832 *et seq.*

protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

Massachusetts law places statutory limits on the use and contents of noncompetition agreements. The law specifically curtails the duration of any noncompete entered into on or after October 1, 2018 to 12 months post-employment. However, if the employee has breached the employee's fiduciary duty to the employer, or misappropriated employer property, the restricted period can be extended up to two years. And while the law also commands that a noncompete agreement must include a garden leave clause that entitles the subject employee to 50% of their highest annualized base salary within the two years prior to termination, the parties can avoid garden leave payments if the agreement specifies "other mutually-agreed upon consideration."[123]

To be legally enforceable in Massachusetts, the law stipulates that noncompetes entered into on or after October 1, 2018, must:

- be in writing and signed by the employer and employee;
- expressly state that the employee can consult an attorney before signing; and
- be provided to the employee either before a formal offer letter, or at least 10 business days before the start of employment, whichever comes first (or in the case of a current employee, at least 10 business days before the agreement's effective date).[124]

The law also addresses the scope and geographic parameters of noncompetes, declaring that noncompetes cannot be any broader than necessary to protect the employer's trade secrets, confidential information, or customer goodwill, and cannot extend beyond "the geographic areas in which the employee … provided services or had a material presence or influence [within the last 2 years of employment]." These restrictions on scope are consistent with how Massachusetts courts have enforced noncompete agreements over the years. Notably, the law specifically recognizes the court's discretion to revise an overly broad agreement to render it enforceable to protect an employer's legitimate business interests.

The law's restrictions on post-employment noncompete agreements apply to both employees and independent contractors. However, employers may not enter into a noncompete with:

- employees who are classified as nonexempt under the Fair Labor Standards Act;
- undergraduate or graduate students on internships (either paid or unpaid), or engaged in other short-term employment while enrolled in full- or part-time education (it is unclear, but this limitation is presumably limited to short-term positions directly related to the students' course of study);

[123] MASS. GEN. LAWS ch. 149, § 24L.

[124] MASS. GEN. LAWS ch. 149, § 24L.

- employees who are terminated without cause or laid off; and
- employees under 18.

The law does not define what it means to be terminated for cause.[125]

Enforceability Following Employee Discharge. In Massachusetts, noncompete agreements are enforceable following discharge, so long as the termination was for cause.

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding. Providing *consideration* means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

The new Massachusetts law does not describe what constitutes sufficient consideration; employers should consider following the court's earlier guidelines. However, the Act does state that when an employer requires a current employee to sign new a noncompete agreement, continued employment is no longer fair and reasonable consideration, which is a significant departure from current Massachusetts noncompete law. In other words, if an employer wants an existing employee to enter into a noncompete arrangement, the employer will need to offer something of value that the employee is not already entitled to receive, such as a signing bonus, in order to secure an enforceable agreement. If the restricted period is extended due to misconduct on the employee's behalf, like theft of employer property, the employer is not required to pay garden leave during the extension.[126]

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place. In Massachusetts, courts have the equitable power to modify a restrictive covenant.[127]

2.3(b)(iv) *State Trade Secret Law*

When an employee leaves a business, the employee may sometimes take valuable information of the business without authorization to use for competitive purposes. In addition to covenants not to compete, Massachusetts law provides other means for employers to protect themselves from a recently

[125] MASS. GEN. LAWS ch. 149, § 24L.

[126] MASS. GEN. LAWS ch. 149, § 24L.

[127] *All Stainless, Inc. v. Colby*, 308 N.E.2d 481 (Mass. 1974).

departed employee's misuse of proprietary information acquired from the employer. *Trade secrets*, which are partially defined by Massachusetts statutes, can be protected in a variety of ways under the Massachusetts Trade Secret Protection Act[128] ("MTSPA"), the Massachusetts Consumer Protection Act,[129] and through various common-law claims.

Under the MTSPA, courts are empowered to enjoin the unlawful use of trade secrets. As one court noted, "the purpose of an injunction in a trade secret case is to protect the secrecy of the misappropriated information, eliminate the unfair advantage obtained by the wrongdoer, and reinforce the public policy of commercial morality."[130] To state a claim for misappropriation of trade secrets under the MTSPA, an employer must establish that:

1. the information in question is a trade secret;
2. the employer took reasonable steps to preserve the secrecy of that information; and
3. the defendant(s) used "improper means, in breach of a confidential relationship, to acquire and use the trade secret."[131]

As a starting point for any claim, the employer must assert that the information that may be or may have been taken by the employee is a protected trade secret. To determine whether given information is a trade secret, courts consider: (1) the extent to which the information is known outside of the owner's business; (2) the extent to which it is known by employees and others involved in the owner's business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the owner and to competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly duplicated by others.[132]

Financial information, marketing plans and strategies, pricing information, and customer lists have routinely been afforded trade secret protection under the MTSPA.[133] Of course, if this information is known to the general public or readily available, it may not constitute a trade secret.[134]

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[128] MASS. GEN. LAWS ch. 93, §§ 42, 42A.

[129] MASS. GEN. LAWS ch. 93A.

[130] *General Elec. Co. v. Sung*, 843 F. Supp. 776, 778 (D. Mass. 1994).

[131] *DB Riley, Inc. v. AB Eng'g Corp.*, 977 F. Supp. 84, 89-90 (D. Mass. 1997); *see also Advanced Micro Devices, Inc. v. Feldstein*, 2013 WL 10944934, at **7-8 (D. Mass. May 15, 2013) (adopting view that employer need not prove actual use of trade secrets, but must show intent to give them to a third party and holding that raw quantity of data taken by departing employees sufficient to show such intent); *Specialized Tech. Res., Inc. v. JPS Elastomerics Corp.*, 2011 WL 1366584, at *16 (Mass. Super. Ct. Feb. 10, 2011) (granting five-year injunction against use of trade secrets where "injunctions granted to prevent trade secret violations are not punitive and only rarely are truly permanent, as they must be reasonable as to time and scope; what is reasonable depends on the facts of each particular case"), *aff'd*, 957 N.E.2d 1116 (Mass. App. Ct. 2011).

[132] *Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921, 925 (Mass. 1972) (quoting RESTATEMENT OF TORTS, § 757 cmt. b).

[133] *See, e.g.*, *Jillian's Billiard Club of Am., Inc. v. Beloff Billiards, Inc.*, 619 N.E.2d 635, 638 (Mass. App. Ct. 1993) (plaintiffs' financial information qualified as a trade secret); *United Rug Auctioneers, Inc. v. Arsalen*, 2003 WL 21527545, at **5-6 (Mass. Super. Ct. Apr. 11, 2003) (information concerning vendors, sales strategy, pricing, and product mix entitled to trade secret protections); *Borden & Remington Corp. v. Banisch*, 1999 WL 1266161, at **3-

Employers seeking to protect trade secrets under the MTSPA or through a restrictive covenant must also show that they took reasonable measures to protect the trade secret. Thus, courts weigh the following factors in determining whether the security precautions taken by the possessor of a trade secret are reasonable: (1) the existence or absence of an express agreement restricting disclosure; (2) the nature and extent of security precautions taken by the possessor to prevent acquisition by unauthorized third parties; (3) the circumstances under which the information was disclosed to any employee (to the extent that they give rise to a reasonable inference that further disclosure, without the consent of the possessor, is prohibited); and (4) the degree to which the information has been placed in the public domain or rendered readily ascertainable by the third parties.[135] In addition, the court must consider the relationship and conduct of the parties, balancing the plaintiff's conduct in maintaining its security measures against the conduct of the defendant in acquiring the information.[136] Requiring passwords to access databases and requiring employees to sign nondisclosure agreements have been held sufficient to warrant protection of trade secrets under the MTSPA.[137]

The measure of damages for the misappropriation of trade secrets is full compensation for the employer's lost profits and requires a defendant to surrender profits realized from the tortious conduct.[138]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

Massachusetts has no statutory guidelines addressing the ownership of employee inventions and ideas.

4 (Mass. Super. Ct. Oct. 18, 1999) (information concerning employer's "pricing, pricing strategy, identity of customers, and general marketing plans" qualified as trade secrets).

[134] *See, e.g.*, *J.T. Healy & Son, Inc. v. James A. Murphy & Son, Inc.*, 260 N.E.2d 723, 729 (Mass. 1970) ("The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret."); *see also Take It Away, Inc. v. Home Depot, Inc*., 374 F. App'x 47, 50 (1st Cir. 2010) (former U.S. Supreme Court Justice David Souter, sitting by designation, opined that under Massachusetts law, the mere combination of two nonsecret concepts does not result in a protectable trade secret, even if the resulting idea has not yet been exploited in the marketplace).

[135] *USM Corp. v. Marson Fastener Corp*., 393 N.E.2d 895, 899-900 (Mass. 1979) (noting that "one who possesses a trade secret and wishes to protect it must act to preserve its secrecy;" however, "an impenetrable fortress is an unreasonable requirement").

[136] 393 N.E.2d at 899-900.

[137] 393 N.E.2d at 900-100 (trade secrets entitled to protection where employees signed nondisclosure agreements and employer denied general public access to its facilities); *United Rug Auctioneers*, 2003 WL 21527545, at *6 (employer took reasonable steps to secure confidential and proprietary information by storing it in a secure location and requiring key employees to sign confidentiality agreements); *Borden & Remington Corp.*, 1999 WL 1266161, at **3-4 (employer took reasonable steps to protect confidential information by disseminating information to sales and management employees only and forbidding them to divulge the information to third parties).

[138] *See Jet Spray Cooler, Inc. v. Crampton*, 282 N.E.2d 921 (Mass. 1972).

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[139]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[140]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[141]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[142]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language

[139] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[140] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[141] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[142] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	common to migrant or seasonal agricultural workers who are not fluent or literate in English.[143]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[144]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[145]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[146]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[147] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[148]

[143] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[144] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[145] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[146] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[147] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[148] 41 C.F.R. §§ 60-300.44, 60-741.44.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[149]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[150]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[151]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[152]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[153]

[149] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[150] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

[151] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[152] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[153] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[154]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[155] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[156]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[157]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[158]

[154] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[155] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

[156] 29 C.F.R. § 13.5.

[157] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[158] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Domestic Violence Leave (included in Massachusetts Wage & Hour Laws Poster)	Employers with 50 or more employees must notify each employee of the rights and responsibilities provided by the domestic violence leave law, including those related to certification requirements and confidentiality.[159]
Benefits & Leave: Family and Medical Leave	Employers must post notice of the benefits provided under the law in a conspicuous place on each premises. The notice must be posted in English and each language that is the primary language of five or more employees or self-employed individuals of that workplace, if such notice is available from the Department of Family and Medical Leave.[160]
Benefits & Leave: Paid Sick Leave	Employers must post conspicuous notice accessible to all employees concerning the earned sick time law. This notice must include information about: • employee rights to earned sick time; • notices, documentation, and any other requirements for employees to exercise their rights to sick time; • protections for employees who exercise their rights; • name, address, phone number, and website of the attorney general's office where questions can be directed; and • filing an action under the sick leave law.

[159] MASS. GEN. LAWS ch. 149, § 52E(k). This poster is available at http://www.mass.gov/ago/docs/workplace/wage/wagehourposter.pdf.

[160] MASS. GEN. LAWS ch. 175M, § 4(a).

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	Employers must also give a copy of this notice to employees.[161]
Benefits & Leave: Parental Leave Act	Employers with six or more employees are required to post a notice "in a conspicuous place" describing the parental leave law, as well as the employer's policies regarding parental leave.[162]
Child Labor (included in Massachusetts Wage & Hour Laws Poster)	Every person employing any minor must post in a conspicuous place, in the minor's work room, a printed notice indicating the number of hours minors may work on each day of the week, with the total for each week, the start and end times for work, and the hours when meal times begin and end for each day of the week.[163]
Domestic Workers: Notice of Rights	Employers that employ domestic workers must post a notice summarizing all state and federal laws applicable to such workers (*i.e.*, written agreement and payroll requirements, evaluations, rest periods, leave entitlements, etc.).[164]
Fair Employment Practices	Employers with six or more employees must post notice informing employees about the state's fair employment laws. The poster summarizes key antidiscrimination provisions, addresses parental leave entitlements, and informs employees where to file a charge.[165]
Fair Employment Practices: Cambridge	Employers with 100 or more employees must post a workplace poster regarding Cambridge's antidiscrimination protections.[166]
Temporary Workers: Right to Know	Staffing agencies must post conspicuous notice in each location, informing temporary workers of their rights, as well as the name and telephone number of the Department of Labor Standards.[167]

[161] MASS. GEN. LAWS ch. 149, § 148C(o); 940 MASS. CODE REGS. 33.09. This poster is available at http://www.mass.gov/ago/docs/workplace/earned-sick-time/est-employee-notice.pdf. It is also available in Spanish, Portuguese, Chinese, Vietnamese, Haitian Creole, Khmer, Lao, Russian, and Italian at http://www.mass.gov/ago/doing-business-in-massachusetts/workplace-rights/ago-publications.html.

[162] MASS. GEN. LAWS ch. 149, § 105D(a), (e); MASS. GEN. LAWS ch. 151B, § 1(5). This poster is available at http://www.mass.gov/mcad/docs/parental-leave-fact-sheet.pdf.

[163] MASS. GEN. LAWS ch. 149, § 74. This poster is available at http://www.mass.gov/ago/docs/workplace/wage/wagehourposter.pdf.

[164] MASS. GEN. LAWS ch. 149, § 190(m), (o). This poster is available at http://www.mass.gov/ago/docs/workplace/domestic-workers/dw-notice-of-rights.pdf. It is also available in Spanish, Tagalog, Nepali, Haitian, Creole, and Portuguese at https://www.mass.gov/info-details/domestic-workers#notice-of-rights-.

[165] MASS. GEN. LAWS ch. 151B, §§ 1(5), 7. This poster is available at http://www.mass.gov/mcad/docs/posters/fairemploymentlawposter.pdf.

[166] CAMBRIDGE, MASS., CODE OF ORDINANCES § 2.76.110.

[167] MASS. GEN. LAWS ch. 149, § 159C(b). This poster is available at http://www.mass.gov/lwd/labor-standards/employment-agency/employment-placement-and-staffing-agencies-program/twrtk-poster-website-

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Unemployment Insurance	Each employer must post conspicuous notice accessible to all employees concerning unemployment compensation. This notice must include: • the name and mailing address of the employer; • the employer's assigned unemployment identification number; • instructions on how to file a claim for unemployment compensation; • the address and telephone number of the regional office nearest the worksite; and • the telephone number of the teleclaim information line.[168]
Wages, Hours & Payroll: Day of Rest	Before operating on Sunday, employers engaged in manufacturing, mechanical, or mercantile establishments or workshops must post notice concerning employees' designated day of rest. The list must indicate the employees who are required or allowed to work on Sunday and must designate a day of rest for each.[169]
Wages, Hours & Payroll: Meal & Rest Breaks (included in Massachusetts Wage & Hour Laws Poster)	Employers (with certain exceptions) must post notice concerning meal break requirements.[170]
Wages, Hours & Payroll: Minimum Wage (included in Massachusetts Wage & Hour Laws Poster)	All employers must post conspicuous notice to employees at the worksite concerning minimum wage and related provisions. The notice must be posted in English, and in any other language spoken by 5% or more of the employer's workforce and for which a translated notice in that language is available from the Commonwealth.[171]
Workers' Compensation	Every insured employer must give written or printed notice to all persons under contract of hire that it has provided for payment to injured

accessible.pdf. It is also available in Spanish, Vietnamese, Chinese, Portuguese, Russian, Khmer, Burmese, French, Nepali, Tigrinya, Haitian Creole, Somali, Swahili, and Arabic at http://www.mass.gov/lwd/labor-standards/employment-agency/employment-placement-and-staffing-agencies-program/notice-of-rights.html.

[168] MASS. GEN. LAWS ch. 151A, § 62A(g). This poster is available at http://www.mass.gov/lwd/docs/dua/2553a-508.pdf.

[169] MASS. GEN. LAWS ch. 149, § 51. Employers must create their own form to satisfy this requirement.

[170] MASS. GEN. LAWS ch. 149, §§ 100-01. This poster is available at http://www.mass.gov/ago/docs/workplace/wage/wagehourposter.pdf.

[171] MASS. GEN. LAWS ch. 151, § 16; 454 MASS. CODE REGS. 27.07(1). This poster is available at http://www.mass.gov/ago/docs/workplace/wage/wagehourposter.pdf. It is also available in Spanish, Chinese, Khmer, Vietnamese, French, Italian, Korean, Lao, Cape Verdean Creole, Russian, Arabic, Portuguese, and Haitian Creole at http://www.mass.gov/ago/doing-business-in-massachusetts/workplace-rights/ago-publications.html.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	employees by the insurer or by self-insurance. Notice can be written rather than in poster form.[172]
Workplace Safety: Hazardous Substances	All employers that manufacture, process, use, or store toxic or hazardous substances in the workplace must maintain material safety data sheets (MSDS) for each product in the workplace. Sheets must be kept in a central location at the workplace and must be provided for employee review upon written request. Additionally, employers must post conspicuous notice in the workplace informing employees of their rights under this law. The notice must be posted in English and in other languages, should the employer have employees who speak other languages.[173]
Workplace Safety: **No Smoking Signs**	Generally speaking, smoking is prohibited in Massachusetts workplaces. Employers are responsible for providing a smoke free environment for employees in enclosed workplaces and must conspicuously post "No Smoking" signs so that they are clearly visible to all employees, customers, and visitors.[174]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[175]	At least 3 years from the date of entry.

[172] MASS. GEN. LAWS ch. 152, §§ 21, 22. This poster is available at https://www.mass.gov/doc/poster-notice-to-employees-english/download. It is also available in Arabic, Cape Verdean Creole, Chinese, Haitian Creole, Khmer, Portuguese, Spanish, and Vietnamese at https://www.mass.gov/service-details/notice-to-employees-poster.

[173] MASS. GEN. LAWS ch. 111F, § 11(a), (b), (e); 454 MASS. CODE REGS. 21.03. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[174] MASS. GEN. LAWS ch. 270, § 22(g)(4).

[175] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[176]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[177]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[178]	At least 1 year from the date the records were made, or from the date of the personnel action involved, whichever is later.
Title VII & the Americans with	*When a charge of discrimination has been filed or an action brought against the employer, it must:*	Until final disposition of

[176] 29 C.F.R. § 1627.3(b).

[177] 29 C.F.R. § 1627.3(b).

[178] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Disabilities Act (ADA): Complaints of Discrimination	• make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[179]	the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[180]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and	At least 3 years following the date on which the polygraph examination was conducted.

[179] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[180] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	the nature of the employee's access to the person or property that is the subject of the investigation.[181]	
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[182]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[183]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[184]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due;	3 years from the last day of entry.

[181] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[182] 29 U.S.C. § 1027.

[183] 29 C.F.R. § 1620.32(a).

[184] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[185] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does	

[185] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[186]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees, and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[187]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[188]	At least 3 years from the last effective date.
Fair Labor	*In addition to other FLSA requirements, employers must*	At least 2 years

[186] 29 C.F.R. § 516.28.

[187] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[188] 29 C.F.R. § 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Standards Act (FLSA): Other Records	*preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[189]	from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation;	At least 3 years.

[189] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[190]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to	At least 4 years after the date the tax is due or paid, whichever

[190] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[191]	is later.
Immigration	Employers must retain all completed Form I-9s.[192]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including	Required to be maintained for "so long as the contents [of the

[191] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[192] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[193]	records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[194]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[195]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation;	At least 4 years after the later of the date the tax is due or paid for the period covered by the

[193] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[194] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[195] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[196]	return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and	At least 30 years.

[196] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[197]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[198]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical and Exposure Records	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[199]	At least 30 years.
Workplace	*Employers must preserve and retain records of employee*	5 years following

[197] 29 C.F.R. § 1910.1020(d).

[198] 29 C.F.R. § 1910.1020(d).

[199] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Safety: Injuries and Illnesses	*injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[200]	the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[201]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract of at least $150,000, the minimum retention period is one year from the date of making the

[200] 29 C.F.R. §§ 1904.33, 1904.44.

[201] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[202]	record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[203]	Until final disposition of the complaint, compliance review or action.
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked;	3 years.

[202] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[203] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
1, 2015), 14026 (contracts entered into on or after January 30, 2022)	• any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[204]	
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract;	During the course of the covered contract as well as after the end of the contract.

[204] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[205]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[206]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which	At least 3 years from the completion of the work records containing the information.

[205] 29 C.F.R. § 13.25.

[206] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	was furnished to the contractor by regulation; and • a copy of the contract.[207]	
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[208]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Benefits & Leave: Paid Sick Leave	Every employer must keep true and accurate records of the accrual and use of earned sick time.[209]	3 years.
Fair Employment Practices: Age Records	Every person must keep true and accurate records of the ages of all employees, to the extent practicable. Records must be made available to the commissioner at any reasonable time.[210]	None specified.
Fair Employment Practices: Criminal History Records	*Employers that request criminal offender record information from the state database must:* • retain an applicant's signed acknowledgement form for a period of one year from the date of any such request; and • document specific details about the dissemination of	1 year.

[207] 29 C.F.R. § 4.6.

[208] 41 C.F.R. § 50-201.501.

[209] MASS. GEN. LAWS ch. 151, § 15; ch. 149, § 148C(m); 940 MASS. CODE REGS. 33.09.

[210] MASS. GEN. LAWS ch. 149, § 24D.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	any criminal history records in a dissemination log and must maintain the log for a period of one year following the disclosure of any record. The dissemination log is subject to audit by the Commonwealth.[211]	
Fair Employment Practices: Personnel Records	*Employers with 20 or more employees must include the following in their employees' personnel records:* • name, address, date of birth, job title, and description; • rate of pay and other compensation; • starting date of employment; • job application; • resumes or other forms of employment inquiry submitted in response to the advertisements; • all employee performance evaluations, including employee evaluation documents; • written warnings of substandard performance; • lists of probationary periods; • waivers signed by the employee; • copies of dated termination notices; and • other documents relating to disciplinary action regarding the employee. Personnel records must be maintained in a typewritten or printed form, or may be handwritten in indelible ink.[212]	3 years after termination of employment, unless an action is brought against the employer. If an action is brought, records must be kept through final disposition.
Fair Employment Practices: Race, Color, or National Origin Records	Every employer, agency, and labor organization must keep records "related to race, color or national origin" as the commission may prescribe by rule or regulation, as necessary to show compliance with state or federal law.[213]	None specified.
Income Tax	*Every person subject to taxation must retain records sufficient to establish:* • amount of gross income; • deductions; • credits; and • other matters required to be shown on a return.	Until the statute of limitations for making additional assessments has expired, usually 3 years after the

[211] MASS. GEN. LAWS ch. 6, § 172; *see also* MASS. GEN. LAWS ch. 151B, § 4(9 1/2).

[212] MASS. GEN. LAWS ch. 149, § 52C.

[213] MASS. GEN. LAWS ch. 151B, § 4.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	Employers required to withhold income tax from wages must keep: • name, address, occupation, and Social Security number of each employee; • amount and date of all wage payments, the period of services covered by the payments, and the amount of tax withheld; • employees' statement of tips received; • employees' request to be withheld on the basis of cumulative wages; • employees' withholding allowance certificates (Forms M-4 and W-4); • employer's copies of employees' wage and tax statements; and • copies of all withholding returns.[214]	return is due or is actually filed, whichever is later. Some exceptions apply and are listed in the regulations.
Public Works Contracts	*Every contractor, subcontractor, or public body engaged in public works must maintain the following records for each mechanic, apprentice, teamster, chauffer, and/or laborer:* • name, address, and occupational classification; • hours worked by and wages paid to each; and • for every week an apprentice is employed by a contractor or subcontractor, a copy of the worker's apprenticeship identification card.[215]	3 years from the date of completion of the contract.
Unemployment Compensation	*An employer must maintain sufficient payroll and other records to allow the commission to determine:* • wages earned by calendar weeks; • whether any week was a week of less than full-time work; • time lost, if any, by such worker due to unavailability for or inability to work; and • payrolls, working sheets, and other records from which information is assembled for preparation of reports filed with the Department of Employment and Training.[216]	4 years from the date of the report containing the information was filed.
Wages, Hours & Payroll	*Each employer must keep true and accurate payroll records about each employee, which must include:*	At least 3 years after entry date of the record.[218]

[214] 830 MASS. CODE REGS. 62C.25.1(1), (7), (10).

[215] MASS. GEN. LAWS ch. 149, § 27B.

[216] MASS. GEN. LAWS ch. 151A, § 45; 430 MASS. CODE REGS. 5.01.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• name, complete address, and occupation; • Social Security number; • amount paid each pay period; • hours worked each day and each week; • rate of pay, vacation pay, and deductions from wages; • any fees or amounts charged by the employer to the employee; • dates on which employee worked each week; and • other information as the director or attorney general in their discretion deem material and necessary.[217]	
Workplace Safety: Hazardous Communications	*Employers must maintain records of training given to employees about hazardous substances in the workplace, proper handling, etc. Records must include, at a minimum:* • a description of the training; • date(s) training was given; • names of employees; and • name of person giving the training.[219]	Duration of each employee's employment.
Workplace Safety: Material Data Safety Sheets	Required material safety data sheets (MSDS) must be maintained and made available to former employees within a reasonable period of time.[220]	30 years.

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

Under Massachusetts law, a *personnel record* is a record that may affect an "employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action."[221] It does not include personal information about another person if disclosure would constitute a clearly unwarranted

[218] The three-year limitations period may be tolled in some instances if an employee files a complaint with the attorney general. *See, e.g.*, An Act Establishing Uniform Wage Compliance and Record Keeping, 2014 Mass. Acts, ch. 292(2014), *available at* https://malegislature.gov/Bills/188/Senate/S858.

[217] MASS. GEN. LAWS ch. 151, § 15; 454 MASS. CODE REGS. 27.07.

[219] 454 MASS. CODE REGS. 21.07.

[220] MASS. GEN. LAWS ch. 111F, § 14.

[221] MASS. GEN. LAWS ch.149, § 52C.

invasion of privacy.[222] Employers of 20 or more employees must retain the following information, as part of a personnel record, for three years following the employee's departure:

- name, address, date of birth, and job title and description;
- rate of pay and any other compensation paid to the employee;
- starting date of employment;
- job application of the employee;
- resumes or other forms of employment inquiry submitted by the employee to the employer in response to an advertisement;
- all employee performance evaluations;
- written warnings of substandard performance;
- lists of probationary periods;
- waivers signed by the employee;
- copies of dated termination notices; and
- any other documents relating to disciplinary action regarding the employee.[223]

The personnel record must be maintained in typewritten or printed form or may be handwritten in indelible ink. The state Uniform Electronic Transactions Act *may* permit electronic retention of personnel records, but the courts have not addressed this issue.[224]

Requests for Access to Personnel Files. An employee or former employee may request to view or copy their personnel file.[225] An employer must provide an employee access to their personnel record within five business days of receiving a written request. The review must take place at the place of employment and during regular business hours.

The employee must be given a copy of their personnel record within five business days of submitting a written request. An employer is not required to allow an employee to view their personnel file on more than two separate occasions in a calendar year.

An employer must notify an employee within 10 days of the employer placing in the employee's personnel record any information that has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation, or the possibility that the employee will be subject to disciplinary action. Upon notification of such information being added to a personal file, the employee may request to see the file. The file must be provided

[222] MASS. GEN. LAWS ch.149, § 52C.

[223] MASS. GEN. LAWS ch.149, § 52C.

[224] MASS. GEN. LAWS ch. 110G, § 4.

[225] MASS. GEN. LAWS ch.149, § 52C.

within five business days. Such a request may not be counted as one of the two annual permitted reviews.[226]

Disputes Over Personnel Files. If an employee disagrees with any of the information in the employee's record, the employee and employer may agree to remove or correct the information. If they cannot agree, the employee may submit a written statement explaining the employee's position. The statement must remain in the personnel record so long as the original information is retained and must be included in any disclosure to a third party.[227]

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see **1.3**.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

For information on state law related to background screenings of current employees, see **1.3**.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

Massachusetts does not have a general statute regulating workplace drug or alcohol testing by private employers. Nonetheless, courts have recognized that an employer has a legitimate business interest in its employees' drug use, to the extent such use has an impact on an employee's work.[228] Private employers are not subject to the same probable cause standard that public employers must satisfy to justify a drug test.[229] Courts have held, however that drug tests in a private employment context implicate the Massachusetts Privacy Act and thus, courts will employ a balancing test, to determine whether an employer's drug testing procedures invade the privacy of its employees.[230] The Privacy Act provides that "[a] person shall have a right against unreasonable, substantial or serious interference

[226] MASS. GEN. LAWS ch.149, § 52C; *see also Kessler v. Cambridge Health Alliance*, 818 N.E.2d 582 (Mass. App. Ct. 2004).

[227] MASS. GEN. LAWS ch.149, § 52C.

[228] *See, e.g.*, *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 116(1st Cir. 1988).

[229] *See Folmsbee v. Tech Tool Grinding & Supply*, 630N.E.2d586, 589n.7 (Mass. 1994).

[230] 630 N.E.2d at 588-90. *But see Connolly v. Boston Edison Co.*, 2001 WL 575868 (D. Mass. May 15 2001) (noting that invasion of privacy claims are preempted by section 301 of the Labor Management Relations Act where the employer imposes a drug-testing program based on its management authority as found in a collective bargaining agreement).

with his privacy."[231] To prove an invasion of privacy, a plaintiff must show that the interference was: (1) unreasonable; and (2) substantial or serious.[232]

In *Folmsbee v. Tech Tool Grinding & Supply*, the Massachusetts Supreme Judicial Court held that the employer's drug testing procedures did not violate its employees' right to privacy because the employer was engaged in dangerous work and there was a strong basis for suspecting that employees were using drugs based on the arrests of two employees, the presence of marijuana cigarettes on the premises, and an employee's enrollment in a rehabilitation clinic. Further, the employer instituted several procedural safeguards, including 30-day notice, the universality of the testing, the promise of an opportunity for rehabilitation for anyone who tested positive, and a visual inspection to maintain the integrity of the testing.[233]

Notably, Massachusetts courts have held that requiring an employee to submit to a urinalysis drug test involves a significant invasion of privacy.[234] Moreover, the balancing test employed under the Privacy Act, suggests that the general interest of all businesses "in protecting the safety of their employees and in providing them a drug-free environment in which to work" is not sufficient by itself to justify the invasion of privacy inherent in requiring an employee to submit to urinalysis.[235] To justify such an invasion, the employer must show that, if the employee were to use controlled substances, the safety of its employees, customers, or others may be at significant risk, or there may be a significant risk of corporate liability or of damage to property.[236] Thus, it may be risky to assume that a court will sanction a program that requires random drug testing of all employees, regardless of their position. Courts will also examine an employee's specific job responsibilities to determine whether an employer's desire to drug test violates an employee's right to privacy.[237]

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[238]

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[231] MASS. GEN. LAWS ch. 214, § 1B.

[232] *Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 N.E.2d 912, 913-14 (Mass. 1991); *Kelley v. CVS Pharm., Inc.*, 23 Mass. L. Rep. 87, at *5 (Mass. Super. Ct. 2007); *see also Haggins v. Verizon New England, Inc.*, 648 F.3d 50, 55 (1st Cir. 2011) (courts look to common industry practices to determine whether the interference is reasonable when a collective bargaining agreement exists).

[233] *Folmsbee*, 630 N.E.2d at 588-90.

[234] *See, e.g.*, *Folmsbee*, 630 N.E.2d at 589; *Horsemen's Benevolent & Protective Ass'n, Inc. v. State Racing Comm'n*, 532 N.E.2d 644, 649 (Mass. 1989) (an individual has reasonable expectations of privacy regarding the information that can be extracted from a urine specimen).

[235] *Harrison v. Eldim, Inc.*, 2000 WL 282446 , at *3 (Mass. Super. Ct. Feb. 16, 2000).

[236] 2000 WL 282446, at *3.

[237] *See Webster v. Motorola, Inc.*, 637 N.E.2d 203, 207-08 (Mass. 1994) (holding that an employer's drug test did not violate employee's right to privacy with respect to an account executive who drove a company car extensively and designed technical materials, but that it was unlawful as applied to an editor of technical texts, whose work was reviewed before it was released and his editing was not likely to affect national security or human health and safety).

[238] 21 U.S.C. §§ 811-12, 841 *et seq*.

3.2(c)(ii) *State Guidelines on Marijuana*

Massachusetts has both a medical[239] and recreational marijuana law.[240]

Under the medical law, an employer is not required to accommodate on-site medical marijuana use in any place of employment.[241] Similarly, under the recreational law, an employer is not required to permit or accommodate conduct otherwise allowed by the law in the workplace.[242] Moreover, under the recreational law, an employer can enact and enforce workplace policies restricting marijuana consumption by employees.[243]

Although neither the medical nor recreational law contains an anti-discrimination provision, the Supreme Judicial Court of Massachusetts held that a qualifying patient fired for testing positive for marijuana due to lawful medical marijuana use may have a civil remedy against an employer for handicap discrimination under state antidiscrimination laws, although no private right of action under the medical marijuana law exists.[244] Under state antidiscrimination laws, a qualified handicapped employee has a right to not be fired because of the handicap, which includes the right to require an employer to make a reasonable accommodation for the handicap to enable an employee to perform the job's essential functions. Therefore, the court reasoned:

> Where, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation.[245]

An employer must prove that lawful medical marijuana use "is not a reasonable accommodation because it would impose an undue hardship on the [employer's] business," *e.g.*, continued use would impair work performance or "pose an 'unacceptably significant' safety risk to the public, the employee, or her fellow employees," or "would violate an employer's contractual or statutory obligation, and thereby jeopardize its ability to perform its business."[246]

Under the medical marijuana laws, health insurance providers need not reimburse a person for medical marijuana expenses. In a workers' compensation dispute, the state supreme court held a workers'

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[239] MASS. GEN. LAWS 94I, §§ 1 *et seq.*

[240] MASS. GEN. LAWS 94G, §§ 1 *et seq.*

[241] 935 MASS. CODE REGS. 501.840.

[242] MASS. GEN. LAWS CH. 94G, § 2.

[243] MASS. GEN. LAWS CH. 94G, § 2.

[244] *Barbuto v. Advantage Sales & Marketing*, 78N.E.3d 37 (Mass. 2017).

[245] 78 N.E.3d at 45.

[246] 78 N.E.3d at 47-48. *But see Melo v. City of Somerville*, 2020 WL 6945938 (D. Mass. Nov. 25, 2020) (in a footnote, the court noted that, even had the employee requested to use marijuana as an accommodation (he did not), it was not convinced marijuana would be a reasonable accommodation due to federal criminal law concerning gun possession by an unlawful user of a controlled substance).

compensation insurance provider was not required to reimburse claimant for medical marijuana expenses.[247]

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[248]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[249]

3.2(d)(ii) *State Data Security Breach Guidelines*

When a business knows or has reason to know of a data security breach, notice is required.[250] Massachusetts defines *security breach* "as the unauthorized acquisition or use of unencrypted data or, encrypted electronic data with the encryption key that is capable of compromising the security, confidentiality, or integrity of personal information," maintained by a covered entity where such breach "creates a substantial risk of identity theft or fraud against a resident" of Massachusetts.[251]

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[247] *Wright's Case*, 156 N.E.3d 161 (Mass. 2020). *See also Delano's Case*, 163 N.E.3d 1037 (Mass. App. Ct. 2021).

[248] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

[249] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[250] MASS. GEN. LAWS ch. 93H, §§ 1 *et seq*.

[251] MASS. GEN. LAWS ch. 93H, § 1.

Covered Entities & Exceptions. Entities subject to the law include any person, corporation, association, partnership, agency, or other legal entity that owns or licenses data, or that maintains or stores data that includes personal information about a Massachusetts resident.[252]

Personal information consists of an individual's first name or first initial and last name in combination with any one or more of the following:

- Social Security number;
- driver's license number or state identification card number; or
- financial account number, or credit card or debit card number, or any required security code, access code, or password that would permit access to any of the resident's financial accounts.[253]

Exceptions. The law creates an exception for information that is lawfully, publicly available through federal, local, or state government records. Additional exceptions apply where covered entities maintain and abide by disclosure procedures as part of an information privacy, security policy, or compliance plan under other laws. Such exceptions include:

- a covered entity that maintains and complies with a notification procedure as part of its own information security policy, so long as the policy affords the same or greater protection to the affected individuals as the statute;
- any person that complies with the notification requirements or security breach procedures of their primary or functional federal regulator;
- any person that is subject to and complies with title V of the Gramm-Leach-Bliley Act; and
- a financial institution that is subject to and in compliance with the Federal Interagency Guidance on Response Programs for Unauthorized Access to Consumer Information and Customer Notice, or the National Credit Union Administration regulations.

Content & Form of Notice. Notice of the breach to affected Massachusetts residents must include:

- the consumer's right to obtain a police report;
- instructions on how to request a security freeze;
- the necessary information and that there is no charge when requesting a security freeze; and
- a description of the security breach in general;
- any mitigation services that will be provided.[254]

Notice may be in one of the following formats:

- written notice;

[252] MASS. GEN. LAWS ch. 93H, § 3(a)-(b).

[253] MASS. GEN. LAWS ch. 93H, § 1.

[254] MASS. GEN. LAWS ch. 93H, § 3(b).

- electronic notice if it is compliant with the federal e-sign act; or
- substitute notice, if
  - the covered entity demonstrates that—
    - the cost of providing notice would exceed $250,000;
    - the affected class of persons to be notified exceeds 500,000;
    - the covered entity does not have sufficient contact information or consent to satisfy standard notification; or
    - the covered entity is unable to identify particular affected individuals.

Substitute notice must consist of all of the following:

- electronic mail notice when the covered entity has an electronic mail address for the subject persons;
- conspicuous posting of the notice on the website of the covered entity if the covered entity maintains a website; and
- notification by major statewide media.[255]

Timing of Notice. Notice must be given as soon as possible and without unreasonable delay. However, notification may be delayed if a law enforcement agency indicates that notification will impede a criminal investigation and requests a delay.[256]

Additional Provisions. In the event of a data security breach, a covered entity must report the breach to the Attorney General's Office, Director of Consumer Affairs and Business Regulations. The notification must include the following:

- the nature of the breach of security or unauthorized acquisition or use;
- the number of residents of the commonwealth affected by such incident at the time of notification
- the name and address of the person or agency that experienced the breach of security;
- the name and title of the person or agency reporting the breach of security, and their relationship to the person or agency that experienced the breach of security;
- the type of person or agency reporting the breach of security;
- the person responsible for the breach of security, if known;
- the type of personal information compromised, including, but not limited to, social security number, driver's license number, financial account number, credit or debit card number or other data;
- whether the person or agency maintains a written information security program; and

[255] MASS. GEN. LAWS ch. 93H, § 1.

[256] MASS. GEN. LAWS ch. 93H, § 4.

- any steps the person or agency has taken or plans to take relating to the incident, including updating the written information security program.

After receipt of notification, the Director of Consumer Affairs and Business Regulations must identify any relevant consumer reporting agency or state agencies that must also be notified by the covered entity. The attorney general may bring an action against a person or entity to remedy violations.[257]

Note that Massachusetts also has regulations requiring covered entities to safeguard personal information of Massachusetts residents. These specific and unique regulations are outside of the scope of this publication.

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[258] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[259]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[260]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[261]

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[257] MASS. GEN. LAWS ch. 93H, § 6.

[258] 29 U.S.C. § 218(a).

[259] 29 U.S.C. § 206.

[260] 29 U.S.C. §§ 203,206.

[261] 29 U.S.C. § 3(m)(2)(B).

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[262] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.3(b) *State Guidelines on Minimum Wage Obligations*

3.3(b)(i) *State Minimum Wage*

As of January 1, 2023, the minimum wage in Massachusetts is $15.00 per hour for most nonexempt employees. The law provides that the state minimum wage can never be less than $0.50 higher than the federal minimum wage.[263]

3.3(b)(ii) *Tipped Employees*

Tipped employees are paid differently. If an employee earns tips, an employer may take a maximum tip credit up to a certain dollar amount per hour and pay a specified minimum cash wage per hour. Note that if an employee does not make the tip credit amount in tips per hour, the employer must make up the difference between the wage actually made and the minimum wage.[264] The minimum cash wage that can be paid to a tipped employee is $6.75 per hour, and the maximum tip credit is $8.25 per hour.

Employers may take tip credits only if: (1) they informed employees, in writing, of the laws governing tipped employees; (2) employees actually received the tips in amounts that satisfies the minimum wage requirements; and (3) employees retained all tips or received them through a valid tip-pooling arrangement.[265]

At the end of every shift, an employer must compare the minimum cash wage paid plus tips earned by the employee to the full minimum wage. If the minimum cash wage paid, plus tips earned, is less than the minimum wage the employee would have earned for that shift, the employer must pay the difference. This assessment must be calculated on a shift-by-shift basis. Tips earned in one day in excess of the minimum wage cannot offset a shortfall on another day. The minimum wage differential amount needed to accommodate any shortfall must be included in the next regular paycheck.[266]

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

Certain waivers from the minimum wage requirements are available from the Massachusetts Division of Occupational Safety (DOS). Employers may request permission from DOS to pay disabled workers a wage rate commensurate with their ability and work performance.[267] In addition, employers may request permission to pay the following types of student employees 80% of the minimum wage:

- students enrolled in and employed by educational institutions;

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[262] 29 U.S.C. § 207.

[263] MASS. GEN. LAWS ch. 151, § 1.

[264] MASS. GEN. LAWS ch. 151, §§ 1, 7; 454 MASS. CODE REGS. 27.02, 27.03.

[265] MASS. GEN. LAWS ch. 149, § 152A; MASS. GEN. LAWS ch. 151, § 7; 454 MASS. CODE REGS. 27.03.

[266] MASS. GEN. LAWS ch. 151, § 7; *see also* Massachusetts Attorney General, Pay and recordkeeping (Tips), *available at* https://www.mass.gov/guides/pay-and-recordkeeping#tips.

[267] MASS. GEN. LAWS ch. 151, § 9.

- students employed in hospital or laboratory training programs;
- summer camp counselors; and
- secondary school students who are employed by certain nonprofit employers on a part-time basis.[268]

3.3(c) *State Guidelines on Overtime Obligations*

In Massachusetts, as under the FLSA, employers must pay nonexempt employees one-and-one-half times their regular rate for all hours worked over 40 in a workweek.[269]

Federal and Massachusetts law differ with respect to the types of compensation that can be excluded from the calculation for purposes of determining the employee's regular rate. Unlike federal law, Massachusetts law excludes the following from the regular rate:

- commissions;
- drawing accounts;
- bonuses; and
- other incentive pay based on sales or production.[270]

Because the types of compensation that can be excluded under state and federal law are not identical, the amount of overtime compensation owed to an employee under federal law might differ from that owed under Massachusetts law. When that occurs, employers should pay the employee the higher of the two.

3.3(d) *State Guidelines on Overtime Exemptions*

The Massachusetts overtime requirements do not apply to the following categories of employees:

- outside salespersons;
- janitors or caretakers of residential property, who when furnished with living quarters are paid a wage of not less than $30 per week;
- golf caddies, newsboys, or child actors or performers;
- learners, apprentices, or individuals with disabilities under a special license;
- individuals employed in the catching or taking of any kind of fish, shellfish, or other aquatic forms of animal and vegetable life;
- switchboard operators in a public telephone exchange;
- drivers or helpers covered under the federal Motor Carrier Act or the Railway Labor Act;
- seasonal employees;
- seamen;

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[268] 454 MASS. CODE REGS. 27.06.

[269] MASS. GEN. LAWS ch. 151, § 1A.

[270] MASS. GEN. LAWS ch. 151, § 1A.

- employees of common carriers;
- in a hotel, motel, motor court, or similar establishment;
- gasoline station employees;
- restaurant employees;
- garagemen, which does not include parking lot attendants;
- employees of a hospital, sanitorium, convalescent or nursing home, infirmary, rest home, or charitable home for the elderly;
- employees of a nonprofit school or college;
- employees of a summer camp operated by a nonprofit charitable corporation;
- laborers engaged in agriculture and farming;[271] and
- employees of amusement parks operated not more than 150 days in any one year.[272]

Further, as under the FLSA, the Massachusetts overtime requirements do not apply to a *bona fide* executive, administrative, or professional employee.[273] Although the statute does not define these terms, the relevant regulations state that the terms *bona fide* executive, administrative, or professional person carry the same meanings as set forth in the FLSA and its regulations.[274] The term *professional person*, as defined under the FLSA regulations, includes certain hourly computer employees.[275]

In addition, highly compensated employees are exempt if they:

> earn a total annual compensation of $100,000 or more, including at least $455 per week on a salary basis; perform office or nonmanual work as their primary duty; and customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.[276]

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last

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[271] Per the state supreme court, the state exemption is more narrowly interpreted than its federal counterpart. *Arias-Villano v. Chang & Sons Enters., Inc.*, 118 N.E. 3d 835 (Mass. 2019).

[272] MASS. GEN. LAWS ch. 151, § 1A.

[273] MASS. GEN. LAWS ch. 151, § 1A.

[274] 454 MASS. CODE REGS. 27.03; *see* 29 C.F.R. §§ 541.100 (executive exemption), 541.200 (administrative exemption), 541.300 (professional exemption); *see also Goodrow v. Lane Bryant Inc.*, 732 N.E.2d 289 (Mass. 2000) (applying FLSA *bona fide* executive test to find "co-manager" at retail store was a nonexempt employee and thus was owed overtime).

[275] 454 MASS. CODE REGS. 27.03; 29 C.F.R. § 541.300.

[276] Massachusetts Dep't of Labor, Div. of Occupational Safety, *Opinion Letter MW-2008-004*, (July 14, 2008), *available at* https://www.mass.gov/media/1684616.

30 minutes or more) are not considered "hours worked" and can be unpaid.[277] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[278]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[279] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[280] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[281] Exemptions apply for smaller employers and air carriers.[282]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[283] Lactation is considered a related medical condition.[284] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[285] For more information on these topics, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

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277 29 C.F.R. § 785.19.

278 29 C.F.R. § 785.18.

279 29 U.S.C. § 218d.

280 29 U.S.C. § 218d(b)(2).

281 29 U.S.C. § 218d(a).

282 29 U.S.C. § 218d(c), (d).

283 42 U.S.C. § 2000gg–1.

284 29 C.F.R. § 1636.3.

285 29 C.F.R. § 1636.3.

3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

Meal Periods. In Massachusetts, no person can be required to work more than six hours during a calendar day without at least 30 minutes for a meal.[286] The definition of *working time* does not include "meal times during which an employee is relieved of all work-related duties."[287] Per the state attorney general, the meal period can be unpaid, and employees can agree to work through their meal periods if they are paid for such time.[288]

Notably, the meal period requirements apply to exempt employees. The term *person* is not defined in the meal period statute. Accordingly, in the absence of an express definition, coupled with the fact the legislature specifically created exemptions to the meal period statute, the law should be interpreted as applying to exempt employees.[289]

The definition of *working time* includes "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 worksite or any other location. . . . Working time does not include meal times during which an employee is relieved of all work-related duties."[290] The state attorney general contends that an employee must be free to leave the workplace during a meal period and that the 30-minute meal period must be paid if, at the employer's request, an employee agrees to remain on the premises during the meal period.[291] The state labor department has opined, based on the attorney general's stance and the above definition of "working time," that an uninterrupted 30-minute meal period in which no work was permitted but during which employee had to remain on employer's premises, was "working time" and compensable.[292]

The meal period requirements do not apply to iron works, glass works, paper mills, letterpress establishments, print works, bleaching works, or dyeing works.[293] In addition, the attorney general may exempt other businesses from the meal period requirements if they are satisfied that exemption is necessary because of the continuous nature of the processes or because of special circumstances affecting such establishments, including collective bargaining agreements. An exemption may be granted if the attorney general concludes exemption can be made without injury to the affected persons.[294]

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[286] MASS. GEN. LAWS ch. 149, §§ 100, 101.

[287] 454 MASS. CODE REGS. 27.02; *see also DeVito v. Longwood Sec. Servs.*, 2016 WL 8200495, at **3-4 (Mass. Super. Ct. Dec. 23, 2016) (stating that the state regulations, not the FLSA predominant benefit test, controls meal period compensability).

[288] Attorney General of Massachusetts, Breaks and time off, *available at* https://www.mass.gov/guides/breaks-and-time-off.

[289] *See* MASS. GEN. LAWS ch. 149, §§ 104,101.

[290] 454 MASS. CODE REGS. 27.02; *see also DeVito*, 2016 WL 8200495.

[291] Attorney General of Massachusetts, *Breaks and Time Off*, *available at* https://www.mass.gov/guides/breaks-and-time-off.

[292] Massachusetts Exec. Office of Labor & Workforce Dev., *Opinion Letter MW-2003-008* (Aug. 5, 2003), *available at* https://www.mass.gov/media/1601506.

[293] MASS. GEN. LAWS ch. 149, § 101.

[294] MASS. GEN. LAWS ch. 149, § 101.

Rest Periods. There are no generally applicable rest period requirements in Massachusetts. However, the definition of *working time* includes "rest periods of short duration, usually 20 minutes or less."[295]

3.4(b)(ii) *State Meal & Rest Periods for Minors*

There are no independent meal or rest period requirements for minor employees in Massachusetts—the adult standards apply. However, where minors are employed, employers must post the hours when the time allowed for meals begins and ends.[296]

3.4(b)(iii) *State Enforcement, Remedies & Penalties*

An employer that violates the meal period statute can be fined between $200 and $600.[297] The statute does not afford an employee a private right of action to enforce the meal period provisions.[298]

3.4(b)(iv) *Lactation Accommodation Under State Law*

Generally, in Massachusetts, an individual has the right to breast feed in any area of a public place (or a place which is open to and accepts or solicits the patronage of the general public) and where the individual and their child may otherwise lawfully be present.[299] While the law does not specifically mention employers, it can be interpreted to include places of employment. The law further provides that no person or entity may restrict, harass, or penalize an individual who is breast feeding their child in a public place. The statute provides a private right of action. The court may award actual damages up to $500, enter an order to restrain such unlawful conduct, and award reasonable attorneys' fees to a prevailing plaintiff.[300]

Additionally, the Massachusetts Pregnant Workers' Fairness Act requires an employer of six or more employees to provide reasonable accommodation for an employee's pregnancy or any condition related to the employee's pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child. The Act is part of and thus enforced using the same mechanisms as set forth in the state fair employment practices law as discussed in **3.11(a)(ii)**.

Reasonable accommodation includes, but is not limited to, more frequent or longer paid or unpaid breaks and private nonbathroom space for expressing breast milk.[301] The space should be free from intrusion by other employees, visitors, and the public, and should be convenient enough for the employee that traveling to and from the space does not materially impact an employee's break time. The space should also allow employees to comfortably express breast milk and/or breastfeed. Examples of features that should be included in the space are sufficient electrical outlets for breast pumps, tables, or other surfaces to hold breast pumps and other needed items, and seating. If an employee's

[295] 454 MASS. CODE REGS. 27.02.

[296] MASS. GEN. LAWS ch. 149, §§ 56,74.

[297] MASS. GEN. LAWS ch. 149, § 100.

[298] *Salvas v. Wal-Mart Stores, Inc.*, 450Mass340, 893 N.E.2d 1187 (Mass. 2008).

[299] MASS. GEN. LAWS ch. 111, § 221.

[300] MASS. GEN. LAWS ch. 111, § 221.

[301] MASS. GEN. LAWS ch. 151B, § 4.

workspace is equivalent to a private, nonbathroom space, the employee may breastfeed or express breast milk at the workspace.[302]

The statute does not specify or limit how often an employee can take a break to breastfeed or express breast milk, nor does the statute specify how long the breaks may last. Employers must allow employees to breastfeed or express milk as often as they need to do so, absent undue hardship.[303]

Lactation breaks may either be paid or unpaid. However, if the employer does provide paid breaks to employees, the employer must allow the employee to use those paid breaks to breastfeed or express breast milk.[304]

While employers are permitted generally to request supporting documentation from an employee's health care provider if the employee requests accommodation under the Pregnant Workers' Fairness Act, the Act does not allow an employer to request health care provider certification from an employee requesting lactation accommodation.[305]

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[306] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[307]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's

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[302] Massachusetts Commission Against Discrimination, *Q&A on Pregnant Workers Fairness Act*, available at https://www.mass.gov/files/documents/2018/02/26/Pregnant%20Workers%20Fairness%20Act%20Questions%20and%20Answers%202018-02-26.pdf.

[303] Massachusetts Commission Against Discrimination, *Q&A on Pregnant Workers Fairness Act*, available at https://www.mass.gov/files/documents/2018/02/26/Pregnant%20Workers%20Fairness%20Act%20Questions%20and%20Answers%202018-02-26.pdf.

[304] Massachusetts Commission Against Discrimination, *Q&A on Pregnant Workers Fairness Act*, available at https://www.mass.gov/files/documents/2018/02/26/Pregnant%20Workers%20Fairness%20Act%20Questions%20and%20Answers%202018-02-26.pdf.

[305] MASS. GEN. LAWS ch. 151B, § 4; Massachusetts Commission Against Discrimination, *Q&A on Pregnant Workers Fairness Act*, available at https://www.mass.gov/files/documents/2018/02/26/Pregnant%20Workers%20Fairness%20Act%20Questions%20and%20Answers%202018-02-26.pdf.

[306] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

[307] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

principal duties include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see **LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS**.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

In Massachusetts, *working time* "[i]ncludes 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 worksite or at any other location, and any time worked before or after the end of the normal shift to complete the work."[308] As mentioned in **3.4(b)(i)**, working time does not include meal times during which an employee is relieved of all work-related duties. Working time includes rest periods of short duration, usually 20 minutes or less.

There are a number of additional issues considered when determining whether activities constitute work. This publication looks more closely at pay requirements for reporting time, on-call time, and travel time. Massachusetts law addresses the compensability of all three.

Reporting Time. Massachusetts has a reporting time pay requirement. In general, when an employee who is scheduled to work three or more hours reports for duty at the time set by the employer and is provided with less than the expected hours of work, employee must be paid for at least three hours of work at no less than the state minimum wage. The employee, however, must be paid the employee's actual wage for any actual time worked. If an employee is, in good faith, scheduled for less than three hours, the employer may pay the employee for only the hours worked.[309] The Massachusetts reporting time pay requirement does not apply to organizations granted status as charitable organizations under the federal Internal Revenue Code.[310]

On-Call Time. Under Massachusetts law, all on-call time is compensable working time unless the employee is not required to be at the worksite and is effectively free to use the time for the employee's own purposes.[311] An employee required to be on duty at the worksite for less than 24 hours is working, even if the employee is allowed to sleep or engage in personal activities when the employee is not busy.

When an employee is required to be on duty at the worksite for 24 or more hours, the employer and employee may agree in writing prior to the beginning of the work to exclude *bona fide* meal periods and a *bona fide* regularly-scheduled sleeping period of not more than eight hours from working time—provided that the employer provides adequate sleeping quarters and the employee can enjoy an uninterrupted period of sleep. If there is no prior written agreement, sleeping time and meal time will be considered compensable working time. If the sleep time is interrupted by a call to duty, all time on duty must be counted as working time. If the sleeping period is interrupted to such an extent that the employee cannot get a reasonable period of sleep, the entire sleep period must be counted as work time.

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[308] 454 MASS. CODE REGS. 27.02.

[309] 454 MASS. CODE REGS. 27.04; Massachusetts Exec. Office of Labor & Workforce Dev., *Opinion Letter MW-2007-002* (July 9, 2007), *available at* https://www.mass.gov/media/1705206.

[310] 454 MASS. CODE REGS. 27.04(1).

[311] 454 MASS. CODE REGS. 27.04(2), (3).

If the employee resides on the employers' 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 written agreement as to the hours worked that takes into consideration all the pertinent facts. Under any such agreement, the employee must be compensated for all time in which job related duties are actually performed and for on-call time if the employee is required to be at the worksite or another location and is not free to use the employee's time for their own purposes.[312]

Travel Time. Time spent for ordinary travel to and from home at the beginning and end of the workday is not compensable. If an employee must report to a location other than the employee's regular worksite, all travel time in excess of the employee's ordinary travel time is compensable, with allowance for transportation expenses.[313]

An employer must compensate an employee for all travel time after the beginning of and before the close of a workday (excluding normal home-to-work commute time) if the employer requires the employee to travel from jobsite to jobsite or on a special one-day assignment to another city. If an employer requires an employee to report to a location other than the worksite or to report to a specified location to take transportation, compensable work time begins at the time of reporting and includes subsequent travel to and from the worksite. However, an employer may establish, prior to performance of work, multiple "working time" rates—one for the work done on the job, and the other for travel time.[314]

Traveling in a company-provided vehicle is not compensable time if the vehicle does not impose a greater operational difficulty than normal, the employee incurs no out-of-pocket expenses, travel is within the normal commuting area for the employer's business, and the employer and employee have agreed to the use of the employer's vehicle. Mandatory travel in a company-provided vehicle to a worksite is compensable. If the employer requires an employee to come to the main office at the start of the workday and ride in a company truck to and from the jobsite, the time spent traveling from the office to the jobsite is compensable. If it is optional, travel time from the worksite back to the main office at the end of the workday is not compensable.[315]

Massachusetts law requires compensation for overnight travel to be granted in accordance with federal law.[316]

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[312] 454 MASS. CODE REGS. 27.04(2), (3); Massachusetts Exec. Office of Labor & Workforce Dev., *Opinion Letter MW-2002-023* (Aug. 12, 2002), *available at* https://www.mass.gov/media/1601471.

[313] 454 MASS. CODE REGS. 27.04; Massachusetts Exec. Office of Labor & Workforce Dev., *Opinion Letter MW-2001-012* (Oct. 9, 2001), *available at* https://www.mass.gov/media/1686586.

[314] 454 MASS. CODE REGS. 27.04; Massachusetts Exec. Office of Labor & Workforce Dev., *Opinion Letter MW-2001-012* (Oct. 9, 2001), *available at* https://www.mass.gov/files/documents/2017/10/27/MW%20Opinion%2010-09-01.pdf, *Opinion Letter MW-2002-019* (June 28, 2002), *available at* https://www.mass.gov/files/documents/2017/10/26/MW%20Opinion%2006-28-02.pdf, and *Opinion Letter MW-2002-012* (Apr. 17, 2002), *available at* https://www.mass.gov/files/documents/2017/10/27/MW%20Opinion%2004-17-02.pdf.

[315] Massachusetts Exec. Office of Labor & Workforce Dev., *Opinion Letter MW-2003-006* (May 16, 2003), *available at* https://www.mass.gov/media/1685336 (mere fact employee travels with company vehicle does not make commuting time compensable time; certain activities considered incidental).

[316] 454 MASS. CODE REGS. 27.04.

Travel from home to a training site for several weeks is not hours worked, as the training site is considered the regular worksite for the duration of the training.[317]

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[318] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[319] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. Like federal law, Massachusetts law sets forth restrictions on the types of work minors may perform and at what age. Table 9 details these restrictions.

Table 9. Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 18	*In Massachusetts, minors under age 18 cannot work in any trade, process, or occupation determined to be dangerous or injurious to such minors. Minors under age 18 cannot work in/at/as/with:* • blast furnaces; • operation of hoisting machinery; • in oiling or cleaning hazardous machinery in motion, or use of a polishing or buffing wheel; • switch or gate tending; • track repairing; • a railroad brakeman, fireman, engineer, motorman, or conductor; • a fireman or engineer upon a vessel or boat; • operating motor vehicles (except golf carts on a golf course, or in the course of employment in an automobile repair shop); • establishments where gun powder, nitroglycerine, dynamite, or other high-power explosive is manufactured or compounded;

[317] *See Taggart v. Town of Wakefield*, 938 N.E.2d 897 (Mass. App. Ct. 2010).

[318] 29 C.F.R. §§ 570.36, 570.50.

[319] 29 C.F.R. § 570.6.

Table 9. Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• manufacture of white or yellow phosphorous or phosphorous matches; • distilleries, breweries, or other establishments where alcohol is manufactured, packed, wrapped, or bottled; • more than 30 feet above the floor of the room or building where working; • in a job requiring the possession or use of a firearm; and • in any part of any hotel, theatre, concert hall, place of amusement, or other establishment where intoxicating liquors are sold (certain exceptions apply).[320] These restrictions do not prohibit the employment of minors in drug stores or retail food stores, nor do they prohibit minors with drivers' licenses from working on a farm operating a self-propelled vehicle if not driving more than 10 miles.
Under Age 16	*In Massachusetts, minors under age 16 also may not work in/at/as/with:* • circular/band saws or ensilage cutters; • wood shapers and jointers; • planers; • picker machines for wool, hair, etc.; • paperlace, leather burnishing, metal or paper cutting, or corner staying machines in paper box factories; • corrugating rolls; • steam boilers; • dough brakes or cracker machinery; • wire or iron straightening or drawing machinery; • rolling mill machinery; • power punches or shears; • washing, grinding, or mixing machinery; • calendar rolls; • laundering machinery; • dangerous electrical machinery or appliances; • adjusting or assisting in adjusting a hazardous belt to any machinery; • oiling or cleaning hazardous machinery, or in proximity to hazardous or unguarded belts, machinery, or gearing while such machinery or gearing is in motion; • scaffolding; • heavy work in building trades; • stripping, assorting, manufacturing, or processing tobacco; • tunnels; • in a public bowling alley, or in a pool or billiard room; • in any capacity on moving motor vehicles; and

[320] MASS. GEN. LAWS ch. 149, §§ 62,63; MASS. GEN. LAWS ch. 138, § 34.

Table 9. Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• in any gasoline service establishment (aside from dispensing gas and oil, or providing courtesy service, outside of the service bay area).[321] Additionally, minors under 16 cannot work in any trade, process, or occupation determined to be dangerous or injurious to such minors. Special exemptions apply for minors 14 or older involved in lawn care and farming.

Restrictions on Selling or Serving Alcohol. An establishment with an alcoholic liquors law license may employ individuals age 18 or older to directly handle or sell alcoholic beverages or alcohol. An establishment with an alcoholic liquors law license may employ minors under age 18 if they do not directly handle, sell, mix, or serve alcohol or alcoholic beverages.[322]

Nonetheless, minors cannot "work in, about or in connection with any saloon or bar room where alcoholic liquors are sold." Nor may a minor be "sent to any disorderly house or house of prostitution or assignation or other immoral place of resort or amusement."[323]

3.6(b)(ii) *State Limits on Hours of Work for Minors*

Under Age 18. In Massachusetts, minors under age 18 cannot work:

- more than nine hours per day;
- more than 48 hours per week;
- more than six days per week;
- between 10:00 P.M. and 6:00 A.M.;
  - *Exception*: Establishments that stop serving at 10:00 P.M. may employ minors ages 16 or 17 until 10:15 P.M. on a school night.
  - *Exception*: Minors ages 16 or 17 may work in restaurants and racetracks until 12:00 A.M. on any night that does not precede a regularly-scheduled school day.
  - *Exception*: Minors age 16 or older may work until 11:30 P.M. on nonschool nights.
- after 8:00 P.M. unless directly supervised by an adult employee;
  - *Exception*: Minors may be employed after 8:00 P.M. at kiosks, carts, or stands in an enclosed shopping mall that employs security personnel from 8:00 P.M. until the mall closes to the general public.

If work performed on any given day is not continuous but is divided into two or more periods, an employer must arrange the minor's work schedule so that all periods fall within 12 consecutive hours.

[321] MASS. GEN. LAWS ch. 149, §§ 61, 62A, 63.

[322] MASS. GEN. LAWS ch. 138, § 34.

[323] MASS. GEN. LAWS ch. 149, § 64.

Special rules apply to minors employed as operators in regular service telephone exchanges or telegraph offices.[324]

Under Age 16. In Massachusetts, minors under age 16 cannot work:

- more than eight hours in one day;
- more than 48 hours in one week;
- more than six days per week; and
- between 7:00 P.M. and 6:30 A.M.
  - *Exception*: Minors may work until 9:00 P.M. from July 1 through Labor Day.

If work performed on any given day is not continuous but is divided into two or more periods, the employer must arrange the minor's work schedule so that all periods fall within nine consecutive hours.

Employers subject to the FLSA should consult the federal section for additional restrictions.[325]

3.6(b)(iii) *State Child Labor Exceptions*

Children may work at any age on a farm owned or operated by their parents.[326]

3.6(b)(iv) *State Work Permit or Waiver Requirements*

Under Age 18. In Massachusetts, employment permits are issued by the superintendent of schools or other authorized person of the Commonwealth where minors reside or attend school (or, if a minor resides outside the Commonwealth, the town where they are to be employed). If an employment permit is issued to a minor under age 16 years authorizing employment in a town other than where the minor resides, a duplicate of the permit must be sent to the superintendent of schools of the town where employment is authorized.

An employer must procure and keep on file a permit for all employees between ages 14 and18, and a complete list of the names and ages of all minors so employed. An employer must return the permit to the issuing official within two days after employment terminates.[327]

Age 17. Minors age 17 that can show documented proof of a high school diploma or its equivalent may be employed without the signature of a superintendent of schools or other authorized person. A minor must provide the person issuing employment permits a pledge or promise form, signed by the employer, the prospective employee, and their parent or guardian.[328]

Ages 16 &17. Special rules apply to minors age 16 years or older who have failed to satisfy the requirements for the completion of the sixth grade. Employers may not employ such minors "while a public evening school is maintained in the town where the minor resides or in the town of employment

[324] MASS. GEN. LAWS ch. 149, §§ 66, 67.

[325] MASS. GEN. LAWS ch. 149, § 65.

[326] MASS. GEN. LAWS ch. 149, § 56.

[327] MASS. GEN. LAWS ch. 149, §§ 86, 87.

[328] MASS. GEN. LAWS ch. 149, § 87.

if he is authorized to attend a public evening school."[329] Employment is permitted, however, if the minor in this situation regularly attends school (evening or day) and presents the employer with a weekly record of school attendance, subject to specified attendance requirements.

3.6(b)(v) *State Enforcement, Remedies & Penalties*

The child labor law strengthens the criminal penalties against employers that violate the law and enhances the power of the state's attorney general to bring civil enforcement actions. Employers may be punished by a fine of up to $5,000, by imprisonment for up to one month, or both.[330] If an employer receives written notice of a violation of the child labor law by an authorized inspector or a supervisor of attendance, the employment of that minor is a separate offense for every day the employment continues.

As an alternative to these criminal proceedings and sanctions, the attorney general may issue a written warning or a civil citation to the person responsible for a violation of the child labor law. The civil citation may impose a civil penalty of up to $250 for the first violation, up to $500 for the second violation, and up to $2,500 for the third and subsequent violations.[331]

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[332]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[333]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the

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[329] MASS. GEN. LAWS ch. 149, § 95.

[330] MASS. GEN. LAWS ch. 149, § 78.

[331] MASS. GEN. LAWS ch. 149, § 78A.

[332] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

[333] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[334]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[335] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[336]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[337] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[338]

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[334] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[335] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

[336] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[337] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[338] 12 C.F.R. § 1005.18.

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[339]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[340]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[341] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[342] Accordingly, among other items, an employer may be required to reimburse an

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339 *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr.. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

340 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

341 *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

342 29 C.F.R. §§ 531.35, 531.36, and 531.37.

employee for expenses related to work uniforms,[343] tools and equipment,[344] and business transportation and travel.[345] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[346]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[347]
- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[348]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[349]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[350]
- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[351] or

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[343] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[344] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[345] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[346] 29 C.F.R. § 778.217.

[347] 29 C.F.R. § 531.38.

[348] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[349] 29 C.F.R. § 531.40.

[350] 29 C.F.R. § 531.40.

- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[352]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[353]

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[354] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[355]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[356]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in

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[351] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[352] 29 C.F.R. § 825.213.

[353] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[354] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[355] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[356] 29 C.F.R. § 531.36.

overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[357]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[358]

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Authorized Instruments. Wages may be paid by check, draft, or direct deposit in a financial institution of the employee's choice. An employer must provide facilities for cashing paychecks at a bank or elsewhere without charge from the face amount.[359]

In Massachusetts, an employer may require direct deposit of wages provided that: (1) the employee is allowed to select the bank or financial institution; and (2) the selected bank is capable of accepting the transfer.[360] State law does not expressly address the use of payroll debit cards as a method of wage payment.

3.7(b)(ii) *Frequency of Payment Under State Law*

In Massachusetts, an employer must generally pay most employees weekly or biweekly. An employer must pay employees within a certain number of days of the end of the pay period, depending on how many days the employee worked in the pay period.

The following employees may be paid biweekly or semi-monthly, if wages are paid no later than six days from the end of the pay period:

- *bona fide* executive, administrative, and professional employees; and
- employees whose salaries are regularly paid on a weekly basis or at a weekly rate for a workweek of substantially the same number of hours from week to week.[361]

Such employees may also, at their own option, be paid monthly if wages are paid no later than six days from the end of the pay period.[362]

3.7(b)(iii) *Final Payment Under State Law*

Employees involuntarily terminated from employment must be paid in full on the day of discharge. In Boston, however, the final wage payment must be made as soon as the local laws requiring payrolls, bills, and accounts to be certified have been satisfied.[363]

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[357] 29 C.F.R. § 531.37.

[358] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[359] MASS. GEN. LAWS ch.149, § 148; MASS. GEN. LAWS ch. 167B, § 7.

[360] MASS. GEN. LAWS ch. 167B, § 7.

[361] MASS. GEN. LAWS ch. 149, § 148.

[362] MASS. GEN. LAWS ch. 149, § 148.

[363] MASS. GEN. LAWS ch. 149, § 148.

Employees that resign from employment must be paid in full on the following regular payday or, in the absence of a regular payday, no later than the following Saturday.[364]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

When wages are paid, an employer must provide an employee a suitable pay slip, check stub, or envelope showing:

- employer's name;
- employee's name;
- day, month, year;
- number of hours worked;
- hourly rate; and
- nature and amount of deductions and increases made for the pay period.

Additionally, when wages are paid, an employer must provide an employee a suitable pay slip, check stub, or envelope showing the amount of each deduction or contribution concerning the following:

- Social Security;
- unemployment compensation benefits;
- pension;
- vacation or health and welfare funds;
- state taxes;
- federal taxes;
- dues check-off; and
- credit unions.[365]

The law requires an employer to furnish each employee a wage statement but does not expressly address electronic statements. The state attorney general has informally advised that electronic wage statements are permitted, but employees must be able to print out statements.[366]

3.7(b)(v) *Wage Transparency*

As noted in **1.3(f)(ii)**, there is a state law that aims to ensure fairness and wage transparency in Massachusetts. It is illegal for an employer to require that an employee refrain from inquiring about, discussing, or disclosing information about the employee's own wages or any other employee's wages.[367]

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[364] MASS. GEN. LAWS ch. 149, § 148.

[365] MASS. GEN. LAWS ch. 149, §§ 148, 150A.

[366] MASS. GEN. LAWS ch. 149, §§ 148, 150; Telephone conversation with Liz, Office of the Att'y Gen. of Mass., Fair Labor Standards Hotline (June 26, 2014).

[367] MASS. GEN. LAWS ch. 149, § 105A(c).

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

Changing Regular Paydays. If on July 1, 1992 an employer was paying employees on a weekly basis, and has been paying employees on a weekly basis, but wants to switch to a biweekly pay schedule, it must give each employee written notice of the change at least 90 days in advance of the first biweekly paycheck.[368]

Changing Pay Rate. There are no general, statutory notice requirements should an employer wish to change pay rates. However, guidance from an attorney general's advisory opinion concerning vacation pay may be interpreted to apply to wages generally and to require notice.

In that opinion, the attorney general's office explained that "[e]mployers may establish the terms of employment and determine the hourly rate or salary to be paid as well as how many hours the employee is expected to work."[369] The opinion notes that employers may also establish vacation policies and that "[a]s is the case with any condition of employment affecting wages, employers may amend the terms of their vacation policies at any time." The opinion expressly provides, however, that "any such amendment . . . must be prospective in nature." Based on this interpretation and its arguable applicability to wage conditions as well as vacation, employers should give notice to employees—preferably in writing and acknowledged by employees—about pay rate changes.

3.7(b)(vii) *Paying for Expenses Under State Law*

In Massachusetts, there is no general obligation to indemnify an employee for business expenses, but there are requirements specific to travel and uniforms. These requirements are part of the state minimum wage act, which exempts, among other occupations, employees in professional service, agricultural and farm work, and certain outside salespeople.[370]

Travel. If an employee who regularly works at a fixed location is required by an employer to report to a different location, the employee must be reimbursed for associated transportation expenses. An employee required or directed to travel from one place to another after the beginning of, or before the close of, a workday must be reimbursed for all transportation expenses.[371]

Uniforms. The term *uniform* is defined as "[a]ll special apparel, including footwear, which is worn by an employee as a condition of employment."[372] Apparel is presumed to be a uniform worn by an employee as a condition of employment if it is "of similar design, color, or material, or it forms part of the decorative pattern of the establishment to distinguish a person as an employee of the place of work."[373] If, however, an employer requires general, basic street clothing, allows variation in details of dress, and an employee chooses the specific type and style of clothing, this apparel is not considered a uniform.

For employers requiring uniforms, the following applies:

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[368] MASS. GEN. LAWS ch. 149, §148.

[369] Office of the Att'y Gen. of Mass., *Advisory from the Attorney General's Fair Labor Division on Vacation Policies, Advisory 99/1*, *available at* http://www.mass.gov/ago/docs/workplace/vacation-advisory.pdf.

[370] MASS. GEN. LAWS ch. 151, § 2.

[371] 454 MASS. CODE REGS. 27.04.

[372] 454 MASS. CODE REGS. 27.02.

[373] 454 MASS. CODE REGS. 27.02.

- If a uniform requires dry-cleaning, commercial laundering, or other special treatment, an employer must reimburse an employee for those actual costs.
- If uniforms are made of "wash and wear" materials, do not require special treatment, and are routinely washed and dried with other personal garments, an employer is *not* required to reimburse maintenance costs.
- An employer cannot require employees to pay a deposit for a uniform or for any other purpose, except with the labor director's permission.
- An employer must reimburse an employee or applicant who is required to purchase or rent a uniform the actual purchase or rental cost.

An employer cannot separately charge or bill an employee for fees or amounts not allowed as deductions.[374]

3.7(b)(viii) *Wage Deductions Under State Law*

Permissible Deductions. Deductions cannot cause an employee's pay to fall below the minimum wage. Exceptions exist for deductions required by law and those allowed for meals and lodging.[375] The general wage payment statute[376] does not prohibit deductions for the following items, if the employee's written authorization is obtained:

- making deposits in, purchasing shares of, or for the repayment of any loan from any credit union;
- deposits in any savings bank, trust company, national banking association, or co-operative bank;
- subscriptions to:
  - a nonprofit hospital service corporation;
  - a medical service corporation; or
  - a charitable corporation;
- payments or contributions of or toward the cost of or the premiums on any insurance policy or annuity contract;
- purchase of government bonds;
- purchase of stock pursuant to an employee stock purchase plan;
- union or craft dues;[377] and
- deductions for tardiness, if the deduction does not exceed the proportionate amount of wages that the employee would have earned during the time the employee would have worked.[378]

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[374] 454 MASS. CODE REGS. 27.05(4)-(5).

[375] 454 MASS. CODE REGS. 27.05.

[376] *See* MASS. GEN. LAWS ch. 149, § 148.

[377] MASS. GEN. LAWS ch. 154, § 8.

[378] MASS. GEN. LAWS ch. 149, § 152.

In addition, the existence of a "valid set-off" is a defense to an action for failure to pay wages.[379] According to the Massachusetts Supreme Judicial Court, unless authorized or required by law, employers cannot deduct from wages except where the funds deducted constitute a valid set-off under Massachusetts General Laws chapter 149, section 150, or, "where there exists a clear and established debt owed to the employer by the employee."[380] While recognizing other valid set-offs could exist, the state high court stated the following would be valid set-offs:

- an undisputed loan or wage advance;
- employee theft or misappropriation established through an independent proceeding with due process protections; and
- employer's judgment against the employee for the value of the employer's property.[381]

The court has explained that it interprets the term "'valid set-off' in the context of [section] 150, . . . in the common, ordinary sense to refer to circumstances where there exists a clear and established debt owed to the employer by the employee."[382] The court has noted that employers intending to rely on such a "valid set-off" defense should have a preexisting written policy or agreement signed by the employee.[383]

Prohibited Deductions. Employers of employees paid hourly or by the day in manufacturing or mechanical establishments cannot deduct from wages due to machinery stoppages if the employee cannot leave the mill while the machinery is being repaired.[384]

Lodging. An employer may deduct costs that cause an employee's pay to fall below the minimum wage for lodging that is safe and sanitary and meets housing standards.[385] However, if an employee is generally paid less than the minimum wage, a lodging deduction is not permitted.

A lodging deduction is permitted only if the employee voluntarily accepts and actually uses the room. Deductions cannot occur unless: (1) the employer provides the employee prior written notice describing the lodging and the amount to be charged the employee; (2) the employer informs the employee that acceptance of lodging is voluntary; and (3) the employee has provided voluntary written acceptance of the lodging and deductions. An employer cannot separately charge or bill an employee for fees or amounts not allowed as deductions.

For detailed information about applying the cost of lodging toward employee wages (*e.g.*, amount), employers should consult the regulation.[386]

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379 MASS. GEN. LAWS ch. 149, § 150.

380 *Camara v. Attorney Gen.*, 941 N.E.2d 1118, 1123 (Mass. 2011) (quoting *Somers v. Converged Access, Inc.*, 911 N.E.2d 739 (Mass. 2009)).

381 *Camara*, 941 N.E.2d at 764 n.13.

382 *Somers v. Converged Access, Inc.*, 911 N.E.2d 739, 750 (Mass. 2009).

383 911 N.E.2d at 750 n.13.

384 MASS. GEN. LAWS ch. 149, § 158.

385 *See* 105 MASS. CODE REGS. 410.000 *et seq*. (sanitary code governing standards of fitness for human habitation).

386 454 MASS. CODE REGS. 27.05.

Meals. An employer may deduct meal costs that cause an employee's pay to fall below the minimum wage, but the deduction cannot exceed the dollar limits set by regulation. However, if an employee is generally paid less than the minimum wage, a deduction is not permitted.

A meal deduction is permitted only if the employee voluntarily accepts and actually receives the meal. Similar to the requirements for a lodging deduction, meal deductions cannot be made unless: (1) the employer provides the employee prior written notice describing the meal plan and amount to be charged employee; (2) the employer informs the employee that acceptance of meals is voluntary; and (3) the employee provides voluntary written acceptance of the meals and deductions. An employer cannot separately charge or bill an employee for fees or amounts not allowed as deductions.

For detailed information about applying the cost of meals toward employee wages (*e.g.*, amount), employers should consult the regulation.[387]

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

Wage Assignments. In Massachusetts, a number of requirements apply to employees wishing to assign a portion of future wages to a third party.[388] The assignment must be in writing and must follow a statutorily-mandated format.[389] An assignment to secure a loan of less than $3,000 will be valid against an employer only after the assignment is accepted in writing by the employer, and after the assignment is recorded with the clerk of the employee's city or town.[390] Such assignment will not be recorded by the clerk unless it states on its face that the sum of 10 dollars per week is exempt.[391] Per the statute, if such an assignment is made by a married man, it will only be valid after obtaining the written consent of the man's wife.[392] Such an assignment will only be valid for a period of one year.[393] Any other assignment may be valid for up to two years, but only if made to secure a debt contracted prior to or simultaneously with the execution of the assignment, and only if signed in writing.[394]

The assignment must utilize the statutory form, must be signed by the assignor in person, and must state the date of execution, the money or the money value of goods actually furnished by the assignee, and the rate of interest, if any, to be paid.[395] Three-fourths of the assignor's weekly earnings will be exempt from assignment, and the assignment must indicate the same on its face.[396]

Wage Garnishments. A wage garnishment is a procedure by which a portion of an employee's earnings are required to be withheld by an employer for payment of a debt.[397] The law sets the maximum

[387] 454 MASS. CODE REGS. 27.05.

[388] MASS. GEN. LAWS ch. 154, §§ 1 *et seq*.

[389] MASS. GEN. LAWS ch. 154, §§ 3, 5.

[390] MASS. GEN. LAWS ch. 154, § 2.

[391] MASS. GEN. LAWS ch. 154, § 2.

[392] MASS. GEN. LAWS ch. 154, § 2.

[393] MASS. GEN. LAWS ch. 154, § 2.

[394] MASS. GEN. LAWS ch. 154, § 3.

[395] MASS. GEN. LAWS ch. 154, § 3.

[396] MASS. GEN. LAWS ch. 154, § 3.

[397] MASS. GEN. LAWS ch. 246.

amount that may be garnished in any one workweek.[398] To the extent federal and state maximums differ, the law most favorable to the debtor will apply.

3.7(b)(x) *State Enforcement, Remedies & Penalties*

An aggrieved employee must file a wage complaint with the state attorney general.[399] Ninety days after filing a complaint with the attorney general (or sooner if the attorney general assents in writing via a "right to sue" letter), and within three years of the violation, an employee alleging a violation of the Massachusetts Payment of Wages statute can file a civil action on their own behalf, and/or on behalf of others who are similarly situated, seeking injunctive relief, damages, and any lost wages and other benefits.[400] The wage payment laws provide liability only for an "employer," which is defined as a "person having employees in his service." For corporations, this means the "president and treasurer of corporation and any officers or agents having the management of such corporation." The law does not impose potential liability on investors or board members acting in that capacity individually.[401]

In 2008, Massachusetts passed a law mandating the award of treble damages for all plaintiffs who prevail on their claims for violations of the overtime law, minimum wage law, prevailing wage law or the Payment of Wages statute.[402] As a result, employers may not rely on their "good-faith" attempts to comply with the law as a defense to treble damages. Prevailing plaintiffs also are entitled to a mandatory award of attorneys' fees and costs.[403]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[404] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[405] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide

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[398] MASS. GEN. LAWS ch. 246, § 28.

[399] MASS. GEN. LAWS ch. 149, § 150.

[400] MASS. GEN. LAWS ch. 149, § 150.

[401] MASS. GEN. LAWS ch. 149, § 148; *Segal v. Genitrix, L.L.C.*, 87 N.E.3d 560 (Mass. 2017) (holding that board members and investors cannot be held liable unless they also served as the company's president, treasurer, or were an officer or agent acting in a management role).

[402] MASS. GEN. LAWS ch. 151, § 1B.

[403] MASS. GEN. LAWS ch. 151, § 1B.

[404] 29 U.S.C. § 1002.

[405] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[406]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

Massachusetts law does not require employers to provide fringe benefits, such as vacation pay, severance pay, or holiday pay, although it does require paid sick leave. Once an employer does establish a policy and promises vacation pay and other types of additional compensation, however, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively. It is important to draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice. Such benefits must be administered uniformly in accordance with the established policy or employment agreement.

In Massachusetts, the definition of *wage* includes any holiday or vacation payments due an employee under an oral or written agreement.[407] An employer cannot by a special contract with an employee or by any other means exempt itself from the law.[408] "[V]acation time promised to an employee is compensation for services which vests as the employee's services are rendered."[409]

In accordance with an attorney general's advisory opinion, "[e]mployers may amend the terms of their vacation policies at any time. Any such amendment, however, must be prospective in nature."[410] Because vacation and similar paid time off is a matter of contract or employer policy in Massachusetts, an employer may set the parameters of accrual, usage, and payout under the policy.

As a result, in Massachusetts, an employer can cap vacation accrual.[411] Further, "an employer may provide that employees begin to earn vacation time after a specific probationary period, such as after six months of employment."[412] Employers may also establish the amount of paid vacation the employee will receive and/or a specific time of the year when the employee can take a vacation, depending on the needs or demands of the business. Employers are free to establish procedures regarding vacation scheduling, such as whether employees must notify their employer of "their intent to take vacation, when they intend to take it, and how much vacation time they plan to take."[413] Employers may adopt a

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[406] 490 U.S. 107, 119 (1989).

[407] In *Mui v. Mass. Port Auth.*, 478Mass. 710 (Mass. 2018), the Supreme Judicial Court of Massachusetts held the definition of "wages" does not include accrued, unused sick time. *See also Hahnfeldt v. Newman*, 94 Mass. App. Ct. 1120 (2019) (same).

[408] MASS. GEN. LAWS ch. 149, § 148; *Lipsitt v. Plaud*, 994 N.E.2d 777 (Mass. 2013); *Byrnes v. Lukes*, 2012 WL 6608974 (Mass. Super. Ct. Sept.27, 2012) (personal days considered wages). *But see Souto v. Sovereign Realty Assocs., Ltd.*, 2007 WL 4708921 (Mass. Super. Ct. Dec. 17, 2007) (personal time not considered wages).

[409] Office of the Att'y Gen. of Mass., *Advisory from the Attorney General's Fair Labor Division on Vacation Policies, Advisory 99/1*, at 1, *available at* http://www.mass.gov/ago/docs/workplace/vacation-advisory.pdf [hereinafter *Advisory 99/1*].

[410] *Advisory 99/1*, at 2.

[411] *Advisory 99/1*, at 1.

[412] *Advisory 99/1*, at 2.

[413] *Advisory 99/1*, at 1.

"use-it-or-lose-it" policy if adequate prior notice of the policy is provided and an employee has a reasonable opportunity to use vacation within the time limits established by policy.[414]

However, in Massachusetts, it is likely that a policy cannot require forfeiture of accrued vacation. Moreover, payout is required when employment ends.[415]

Employers are encouraged to define policy terms in clear and unambiguous language. The attorney general's advisory opinion, for example, cautions that "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 because the definitions of the time periods are imprecise and subject to confusion concerning their start and end dates."[416] According to the attorney general, if a 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."[417] The Massachusetts attorney general additionally recommends that employers that "provide annual leave instead of vacation leave should designate the amount of hours or days of the leave which are considered vacation time."[418]

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

Massachusetts does not have general provisions, applicable to all employers, governing the payment of holidays or requiring a day of rest. However, under its "Blue Laws," certain types of employers—including manufacturers and retail employers—must provide a day of rest.

Holidays. Manufacturers may operate on the following holidays *with the proper permit*. However, manufacturing employees may not be required to work on any of the following legal holidays. They must be given the option to work or not on:

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[414] *Electronic Data Sys. Corp. v. Attorney Gen.*, 907 N.E.2d 635 (Mass. 2009) (holding that vacation can be lost if not used where employee had reasonable opportunity to use and be paid for time); *see also* Office of the Att'y Gen. of Mass., *Advisory from the Attorney General's Fair Labor Division on Vacation Policies, Advisory 99/1*, at 2, *available at* http://www.mass.gov/ago/docs/workplace/vacation-advisory.pdf (expressly permitting "use it or lose it" caps if the employer provides sufficient prior notice and ensures "that employees have a reasonable opportunity to use the accumulated vacation time within the time limits established by the employer").

[415] *Electronic Data Sys. Corp.*, 907 N.E.2d 635; *Electronic Data Sys. Corp. v. Attorney Gen.*, 798 N.E.2d 273 (Mass. 2003); *Morris v. J.J. Best & Co.*, 2008 WL 4594982 (Mass. App. Div. Oct. 6, 2008); *Local 589, Amalgamated Transit Union v. Mass. Bay Transp. Auth.*, 2006 WL 3201309 (Mass. Super. Ct. Aug. 18, 2006); *see also Dixon v. City of Malden*, 984 N.E.2d 261 (Mass. 2013); *LeMaitre v. Mass. Tpk. Auth.*, 897 N.E.2d 1218 (Mass. 2008); *Advisory 99/1*, at 2 (stating that "[w]ithholding vacation payments [from final wages] is the equivalent of withholding wages and, as such, is illegal").

[416] *Advisory 99/1*, at 2.

[417] *Advisory 99/1*, at 2.

[418] *Advisory 99/1*, at 2.

- New Year's Day
- Martin Luther King Day
- Presidents Day
- Evacuation Day (Suffolk County only)
- Patriots Day
- Memorial Day
- Bunker Hill Day (Suffolk County only)
- Independence Day
- Labor Day
- Columbus Day
- Veterans Day
- Thanksgiving Day
- Christmas Day[419]

If the business is not retail and not manufacturing, it may operate on the following holidays with *no permit* and require employees to work:

- New Year's Day
- Martin Luther King Day
- Presidents Day
- Evacuation Day
- Patriots Day
- Bunker Hill Day
- Columbus Day after 12 noon
- Veterans Day after 1 P.M.

If the business is not retail and not manufacturing, it may operate on the following holidays *only if it gets a local permit*. If it receives the permit, it may require employees to work:

- Memorial Day
- Independence Day
- Labor Day
- Columbus Day before 12 noon
- Veterans Day before 1 P.M.
- Thanksgiving Day

[419] MASS. GEN. LAWS ch. 149, § 45; ch. 4, § 7(18).

- Christmas Day

If the business is retail, it may operate on the following holidays with *no permit* and require employees to work:

- Martin Luther King Day
- Presidents Day
- Evacuation Day
- Patriots Day
- Bunker Hill Day

If the business is retail, it may operate on the following holidays *with no permit.* However, the employer may not require employees to work:

- New Year's Day
- Memorial Day
- Juneteenth Independence Day (June 19)
- Independence Day
- Labor Day
- Columbus Day (after 12 noon)
- Veterans Day (after 1 P.M.)

If the business is retail, it may operate on the following holidays only if the MA DLS issues a statewide approval and the retailer receives a local permit. However, employers may not require employees to work:

- Columbus Day (before 12 noon)
- Veterans Day (before 1 P.M.)
- Thanksgiving Day
- Christmas Day[420]

If a holiday falls on a Sunday, then the legal holiday requiring closure is observed on the Monday after. Therefore, a business may need to be closed on the Monday following a Sunday holiday. However, if Christmas falls on a Sunday, then a retailer may be open on the following Monday.[421]

As discussed in **3.9(l)(ii)**, an employee who is a veteran must be granted a leave of absence to participate in a Veterans Day or Memorial Day exercise, parade, or service.

Days of Rest. Certain employers may not require employees to perform their usual work on a Sunday unless given 24 consecutive hours without work in the following six days. This restriction applies to

[420] MASS. GEN. LAWS ch. 4, § 7(18).

[421] MASS. GEN. LAWS ch. 136, § 6(50).

employees that are engaged in a commercial occupation, in the work of an industrial process, or in transportation or communication. This limitation does not affect manufacturing, mechanical, or mercantile employers, who are subject to special rules.[422]

For manufacturing, mechanical, or mercantile establishments, employers must allow employees at least 24 hours rest every seven consecutive days. Certain exceptions exist, and the state attorney general may grant exemptions. Before operating on a Sunday, an employer must post a schedule with a list of employees who are required or allowed to work on Sunday, designating the day of rest for each.[423]

Regardless of exemption status, however, retail employers cannot require employees to work on Sunday, and an employee's refusal to work may not be grounds for dismissal, discrimination, discharge, reduction of hours, or other penalty.[424]

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[425] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[426] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[427] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

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[422] MASS. GEN. LAWS ch. 149, § 47.

[423] MASS. GEN. LAWS ch. 149, § 48.

[424] MASS. GEN. LAWS ch. 136, §§ 5, 6.

[425] 29 U.S.C. § 1144.

[426] 29 U.S.C. § 1161.

[427] 29 U.S.C. § 1167(3).

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

Couples may register as domestic partners in several cities in Massachusetts, including Boston, Brewster, Brookline, Cambridge, Nantucket, and Provincetown. However, state law does not address whether an employee's domestic partner is required to be considered an eligible beneficiary or dependent for purposes of employee benefit plans.

Massachusetts has also recognized civil unions entered into in other jurisdictions as the equivalent of a marriage.[428]

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[429]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[430]
- to take medical leave when the employee is unable to work because of a serious health condition;[431]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[432] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[433] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

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[428] *Elia-Warnken v. Elia*, 972 N.E.2d 17, 36 (Mass. 2012) (Vermont civil union treated as a marriage for purposes of Massachusetts law).

[429] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[430] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[431] 29 C.F.R. §§ 825.112, 825.113.

[432] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[433] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

Massachusetts employers are required to provide paid family and medical leave to eligible employees.[434] As discussed below, paid family and medical leave benefits is financed through a payroll tax.

Coverage and Eligibility. Under the family and medical leave law, *employer* means any employing unit subject to the state's unemployment insurance law.[435] *Employee* means any covered individual employed by any employer subject to the state's unemployment insurance law.[436] A *covered individual* includes:

- an employee who meets the financial eligibility requirements for unemployment benefits provided that employment has been with an employer in the Commonwealth;[437]
- a former employee who has met the financial eligibility requirements for unemployment benefits provided that employment has been with an employer in the Commonwealth, and who has been separated from employment for not more than 26 weeks at the start of the former employee's family or medical leave; or
- certain 1099-MISC independent contractors.[438]

Self-employed individuals who have elected coverage under the paid family and medical leave law and have reported self- employment earnings are also eligible.[439]

Leave taken under chapter 175M runs concurrently with leave taken under the Massachusetts Parental Leave Law or under the federal Family and Medical Leave Act (FMLA). Employees who take paid family and medical leave while ineligible for leave under the FMLA are permitted to take leave under the FMLA in the same benefit year only to the extent they remain eligible for concurrent leaves.[440]

Permissible Reasons for Leave. Family leave is available to an eligible employee for any of the following reasons:

- to bond with the employee's child during the first 12 months after the child's birth or the first 12 months after the placement of the child for adoption or foster care with the employee;[441]

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[434] MASS. GEN. LAWS ch. 175M, § 1.

[435] MASS. GEN. LAWS ch. 175M, § 1; MASS. GEN. LAWS ch.151, § 1(i).

[436] MASS. GEN. LAWS ch. 175M, § 1; MASS. GEN. LAWS ch.151, § 1(h).

[437] MASS. GEN. LAWS ch. 151A, § 24(a).

[438] MASS. GEN. LAWS ch. 175M, § 1; Department of Family and Medical Leave, *Who's a Covered Individual Under the PFML Law?*, *available at*: https://www.mass.gov/info-details/whos-a-covered-individual-under-the-pfml-law#counting-ma-1099-misc-contractors-as-covered-individuals-.

[439] MASS. GEN. LAWS ch. 175M, § 1.

[440] MASS. GEN. LAWS ch. 175M, § 2(i).

[441] A covered individual may be eligible for leave to bond with their child for births, adoptions, and foster care placements that occurred in 2020, before the law was effective. The leave must be completed during the first 12 months after the child's birth, adoption, or foster care placement, and must be completed during calendar year 2021. Additional rules apply for employees of acute care hospitals. 458 MASS CODE REGS. 3.00, 3.02.

- to care for a family member with a serious health condition;
- because of any qualifying exigency arising out of the fact that a family member is on active duty or has been notified of an impending call or order to active duty in the Armed Forces; or
- in order to care for a family member who is a covered servicemember.[442]

The family military leave provisions will be discussed in detail in the military leaves content in **3.9(k)**.

Medical leave is available to an eligible employee with a serious health condition.[443]

Child means a biological, adopted, or foster child, a stepchild or legal ward, a child to whom the covered individual stands in loco parentis, or a person to whom the covered individual stood in loco parentis when the person was a minor child. *Family member* means the spouse, domestic partner, child, parent or parent of a spouse or domestic partner of the covered individual; a person who stood in loco parentis to the covered individual when the covered individual was a minor child; or a grandchild, grandparent or sibling of the covered individual. *Serious health condition* means an illness, injury, impairment or physical or mental condition that involves inpatient care in a hospital, hospice or residential medical facility, or continuing treatment by a health care provider.[444]

Length of Leave. The amount of leave available depends on the reason for using leave:

- An employee is not eligible for more than 12 weeks of family leave in a benefit year.
- An employee taking family leave in order to care for a covered servicemember is not eligible for more than 26 weeks of family leave in a benefit year.
- An employee is not eligible for more than 20 weeks of medical leave in a benefit year.
- An employee may not take more than 26 weeks, in the aggregate, of family and medical leave in the same benefit year.[445]

Benefit year means the period of 52 consecutive weeks beginning on the Sunday immediately preceding the first day that job-protected paid family and medical leave commences for the employee.[446]

The statute does not prevent an employee from taking a medical leave during pregnancy or recovery from childbirth if supported by documentation by a health care provider that is immediately followed by family leave, in which case the seven-day waiting period for family leave is not required.[447]

Intermittent and Reduced Schedule Leave. The availability of intermittent or reduced schedule leave depends on the type of leave used.

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[442] MASS. GEN. LAWS ch. 175M, § 2(a)(1), (b).

[443] MASS. GEN. LAWS ch. 175M, § 2(a)(2).

[444] MASS. GEN. LAWS ch. 175M, § 1.

[445] MASS. GEN. LAWS ch. 175M, § 2(c).

[446] MASS. GEN. LAWS ch. 175M, § 1.

[447] MASS. GEN. LAWS ch. 175M, § 2(c)(1).

- An employee cannot use intermittent or reduced schedule leave to bond with a newborn child or a child placed with the employee for adoption or foster care unless the employee and the employer agree otherwise.
- Leave due to a qualifying exigency related to a servicemember's active duty may be taken intermittently or as a reduced schedule.
- Medical leave for the employee's own serious health condition and family leave to care for a family member with a serious health condition may be taken intermittently or as a reduced schedule where medically necessary.[448]

Taking leave intermittently or on a reduced schedule cannot result in a reduction in the total amount of paid family and medical leave to which the employee is entitled.[449]

Requesting Paid Leave Benefits. An employee must file a benefit claim pursuant to regulations to be issued by the Department of Family and Medical Leave. If a claim is filed more than 90 calendar days after the start of leave, the employee may receive reduced benefits.[450] The Department must provide a notice of eligibility or ineligibility to a claimant within 14 days of receiving the claim. The Department will also notify an employer within five days of receiving a claim that a claim has been filed.[451]

Certification. All claims for benefits must include supporting certification. Willfully providing a false statement or representation or withholding material facts will result in the employee becoming ineligible for benefits.[452]

Certification for an employee taking medical leave must state the date on which the serious health condition commenced, the probable duration of the condition, and the appropriate medical facts within the knowledge of the health care provider.[453]

Certification for an employee taking family leave due to a family member's serious health condition must state the date on which the serious health condition commenced, the probable duration of the condition, the appropriate medical facts within the knowledge of the health care provider, a statement that the covered individual is needed to care for the family member, an estimate of the amount of time that the covered individual is needed to care for the family member, and certain identifying information regarding the family member.[454]

Certification for an employee taking family leave because of the birth of the employee's child is sufficient if the employee provides either the child's birth certificate or a document issued by the child's health care provider or the health care provider of the person who gave birth, stating the child's birth date.[455] Certification for an employee taking family leave because of the placement of a child for adoption or foster care is sufficient if the employee provides a document issued by the child's health

[448] MASS. GEN. LAWS ch. 175M, § 2(c)(2).

[449] MASS. GEN. LAWS ch. 175M, § 2(c)(2).

[450] MASS. GEN. LAWS ch. 175M, § 5(a)(1).

[451] MASS. GEN. LAWS ch. 175M, § 8.

[452] MASS. GEN. LAWS ch. 175M, § 5(a)(1), (c).

[453] MASS. GEN. LAWS ch. 175M, § 5(a)(2).

[454] MASS. GEN. LAWS ch. 175M, § 5(a)(3); 458 MASS. CODE REGS. 2.08.

[455] MASS. GEN. LAWS ch. 175M, § 5(a)(4).

care provider, by an adoption or foster care agency involved in the placement, or by other individuals as determined by the Department that confirms the placement and the date of placement. To the extent that an employee's status as an adoptive or foster parent changes while an application for benefits is pending, or while the employee is receiving benefits, the employee is required to notify the Department of the change in status in writing.[456]

Additional certification requirements apply for an employee taking family leave benefits for a qualifying exigency arising out of a family member's active military duty or to take care of a family member who is a covered service member.[457]

The Department will establish good cause exemptions from the certification requirement deadline in the event that an employee's serious health condition prevents the employee from providing the required certification within 90 calendar days of the start of leave.[458]

Providing Notice to Employer. The employee must give not less than 30 days' notice to the employer of the anticipated starting date of the leave, the anticipated length of the leave and the expected date of return. Alternatively, the employee must provide notice as soon as practicable if the delay is for reasons beyond the employee's control. If an employer fails to provide written or posted notice of an employee's rights and obligations under the law, the employee's notice requirement is waived.[459]

Compensation During Leave. While on family or medical leave, an employee receives a weekly benefit amount.[460] No family or medical leave benefits are payable during the first seven calendar days of leave.[461] The paid leave benefits replace an employee's pay with a weekly benefit cap that is adjusted annually, or a rate adjusted to equal 64% of the state average weekly wage. Up to the first half of the state average weekly wage (adjusted annually), the employee will be reimbursed at a rate of 80%. Subsequently, the employee receives half of the difference between the employee's weekly wage and the state average weekly wage. Employees taking leave on an intermittent or reduced leave schedule receive a prorated weekly benefit amount.[462]

Employers are subject to a mandatory 0.68% payroll tax contribution (0.88%, effective January 1, 2024) to fund the paid leave benefits as maintained in the Family and Employment Security Trust Fund. Employees are required to cover all of the family leave contribution and 40% of the medical leave contribution. Employers will cover at least 60% of the contribution to the medical leave trust fund. Employers with fewer than 25 employees are exempt from paying the employer share of the contributions.[463]

An employer may require that payment be made concurrently or otherwise coordinated with payment made or leave allowed under the terms of disability or family care leave under a collective bargaining

[456] MASS. GEN. LAWS ch. 175M, § 5(a)(5).

[457] 458 MASS CODE REGS. 2.08.

[458] MASS. GEN. LAWS ch. 175M, § 5(a)(1).

[459] MASS. GEN. LAWS ch. 175M, § 4(b).

[460] MASS. GEN. LAWS ch. 175M, § 2(d).

[461] MASS. GEN. LAWS ch. 175M, § 3(a).

[462] MASS. GEN. LAWS ch. 175M, §§ 3(a), 6, 7.

[463] MASS. GEN. LAWS ch. 175M, §§ 3(b), 6, 7.

agreement or employer policy such that the employee will receive the greater of the various benefits that are available for the covered reason for using leave. Any leave provided under a collective bargaining agreement or employer policy that is used by the employee for a covered reason and paid at the same or higher rate than family and medical leave counts against the allotment of leave. The employer must provide employees written notice of this requirement.[464]

The weekly benefit amount is reduced by the amount of wages or wage replacement that an employee receives for that period under any of the following while on paid family or medical leave:

- any government program or law, including but not limited to workers' compensation; or
- an employer's permanent disability policy or program.[465]

The weekly benefit amount is not reduced by the amount of wage replacement that an employee receives while on paid family or medical leave under any of the following conditions, unless the aggregate amount an employee would receive would exceed the employee's average weekly wage:

- a temporary disability policy or program of an employer;
- an employer's paid family or medical leave policy;
- any accrued sick, vacation, or other paid leave provided under an employer policy (effective November 1, 2023); or
- wages received from another employer or through self-employment.[466]

If an employer makes payments to an employee during any period of family or medical leave that are equal to or more than the amount required under the paid family and medical leave law, the employer will be reimbursed out of any benefits due or to become due from the paid family and medical leave benefit fund for that employee covering the same period of time as the payments made by the employer.[467]

An employer cannot compel an employee to exhaust rights to any sick time, vacation, or personal time off prior to or while taking leave.[468] An employee may utilize accrued sick or vacation pay or other paid leave provided under an employer policy during the first 7 calendar days of leave when paid leave benefits are unavailable.[469]

Fringe Benefits During Leave. Taking family or medical leave cannot affect an employee's right to accrue vacation time, sick leave, bonuses, advancement, seniority, length of service credit, or other employment benefits, plans or programs. During the duration of an employee's family or medical leave, the employer must continue to provide for and contribute to the employee's employment-related

[464] MASS. GEN. LAWS ch. 175M, § 2(h)(2).

[465] MASS. GEN. LAWS ch. 175M, § 3(c).

[466] MASS. GEN. LAWS ch. 175M, § 3(c); 458 MASS. CODE REGS. 2.12.

[467] MASS. GEN. LAWS ch. 175M, § 3(c).

[468] MASS. GEN. LAWS ch. 175M, § 2(h)(1).

[469] MASS. GEN. LAWS ch. 175M, § 3(a).

health insurance benefits, if any, at the level and under the conditions coverage would have been provided if the employee had continued working continuously for the duration of the leave.[470]

The provisions concerning employee benefits and other entitlements as described in § 2(f) do not apply to an eligible former employee using leave.[471]

Reinstatement. An employee who has taken family or medical leave must be restored to the employee's previous position, or to an equivalent position, with the same status, pay, employment benefits, length of service credit and seniority as of the date of leave.[472]

An employer is not required to restore an employee who has taken family or medical leave to the previous or to an equivalent position if other employees of equal length of service credit and status in the same or equivalent positions have been laid off due to economic conditions, or other changes in operating conditions affecting employment during the period of leave. However, the employee who has taken leave retains any preferential consideration for another position to which the employee was entitled as of the date of leave.[473]

The reinstatement provisions do not apply to an eligible former employee using leave.[474]

Notice to Employees. Covered employers must provide notice to employees of their rights and obligations under the paid family and medical leave law by doing each of the following:

- posting a notice in the workplace in English and each language other than English which is the primary language of five or more employees in that workplace, if such notice is available from the Department of Family and Medical Leave (the Department will publish notices in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian and any other language that is the primary language of at least 10,000 or one-half of one percent of all residents of the Commonwealth);
- not more than 30 days from the beginning of employment, providing new employees with the following written information provided or approved by the Department in the employee's primary language:
  - an explanation of the availability of family and medical leave benefits, including the right to reinstatement and continuation of health insurance;
  - the employee's contribution amount and obligations;
  - the employer's contribution amount and obligations;
  - the employer's name and mailing address;
  - the identification number assigned to the employer by the Department;
  - instructions on how to file a claim for family and medical leave benefits;

[470] MASS. GEN. LAWS ch. 175M, § 2(f).

[471] MASS. GEN. LAWS ch. 175M, § 2(g).

[472] MASS. GEN. LAWS ch. 175M, § 2(e).

[473] MASS. GEN. LAWS ch. 175M, § 2(e).

[474] MASS. GEN. LAWS ch. 175M, § 2(g).

  - the Department's mailing address, email address and telephone number; and
  - any other information deemed necessary by the Department.
- at the time a contract is formed, providing a self-employed individual with whom the employer contracts a notice of rights and obligations under the law, including the same information set forth above as well as information on the Department's procedures for a self-employed individual to become a covered individual.[475]

Delivery of the written notice occurs when an employee or self-employed individual provides written acknowledgement of receipt of the information, or signs a statement indicating their refusal to sign the acknowledgement.[476]

Antidiscrimination. It is unlawful for any employer to retaliate against an employee by discharging, firing, suspending, expelling, disciplining, through the application of attendance policies or otherwise, threatening, or in any other manner discriminating against an employee for:

- exercising any right to which the employee is entitled under the family and medical leave law or with the purpose of interfering with the exercise of any right to which the employee is entitled under the law;
- filing a complaint or instituting or causing to be instituted a proceeding under or related to the law; or
- testifying or preparing to testify in an inquiry or proceeding or giving or preparing to give information connected to any inquiry or proceeding relating to the law.[477]

A rebuttable presumption of retaliation will be applied to any negative change in an employee's seniority, status, employment benefits, pay or other terms or conditions of employment that occurs any time during a family and medical leave taken by the employee, or during the six-month period following an employee's leave or restoration to a position, or of an employee who has participated in proceedings or inquiries pursuant to this section within 6 months of the termination of proceedings.[478]

Enforcement. The paid family and medical leave law will be enforced by the Department of Labor and Workforce Development.[479] An employee alleging a violation of the law may bring a civil action within three years of the alleged violation.[480]

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be

[475] MASS. GEN. LAWS ch. 175M, § 4(a).

[476] MASS. GEN. LAWS ch. 175M, § 4(a).

[477] MASS. GEN. LAWS ch. 175M, § 9.

[478] MASS. GEN. LAWS ch. 175M, § 9.

[479] MASS. GEN. LAWS ch. 175M, § 8.

[480] MASS. GEN. LAWS ch. 175M, § 9.

accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[481] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

3.9(b)(ii) *State Guidelines on Paid Sick Leave*

Coverage & Eligibility. The Massachusetts paid sick leave law applies to most private-sector employers in the state. However, the First Circuit Court of Appeals held the federal Railroad Unemployment Insurance Act (RUIA) preempts, as to RUIA-covered employees, a provision in the law that says leave must be provided to "care for the employee's own physical or mental illness, injury, or medical condition that requires home care, professional medical diagnosis or care, or preventative medical care," and remanded the case to the district court "for further consideration of whether other parts of the Massachusetts law that are not within the preemptive reach of the RUIA, and are not otherwise preempted by another federal law, might still be applied to interstate rail carriers."[482] On remand, the district court granted summary judgment for the employers, holding the RUIA text reflects a congressional intent to ensure the RUIA is the exclusive source of all sickness benefits for railroad employees and to preclude employees from claiming rights to sickness benefits under any comparable state law, such as the paid sick leave law.[483] Additionally, more recently, a federal district court judge granted summary judgment to an association that challenged the law's applicability to the airline industry, holding that the association "demonstrated that [the law] is preempted as applied to [] in-flight and ground employees. . . . This conclusion is based on the substantial evidence presented at trial that showed that [the law] logically will cause, and has caused, increased employee sick calls and, in turn, that these increased employee sick calls logically will cause, and have caused, a significant impact on the Airlines' services." In reaching this conclusion, the judge observed that leave misuse was common in the airline industry, and that the law interfered with airlines' ability to implement policies to curb misuse like maintaining attendance-based policies and requiring a doctor's note to substantiate an absence. Per the judge, employees calling out sick affected airlines' ability to provide services to customers.[484] It is possible, however, that Massachusetts could appeal the ruling.

The Massachusetts law's requirements differ depending on the size of the company.[485] All covered employers, regardless of their size, must provide sick leave to employees. Employers with 11 or more employees, however, must provide paid sick leave. Employers with less than 11 employees must provide, at a minimum, unpaid sick leave. When calculating the total number of employees for purposes of the law, employers must count all full-time, part-time, seasonal, and temporary employees (whether working in or outside Massachusetts and regardless of their eligibility to accrue and use earned sick time) and owners and officers on the company's payroll.[486]

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[481] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[482] *CSX Transp. v. Healey*, 861 F.3d 276 (1st Cir. 2017).

[483] *CSX Transp., Inc. v. Healey*, 327 F. Supp. 3d 260 (D. Mass. 2018).

[484] *Air Transp. Ass'n of Am., Inc. v. Campbell*, 2023 WL 3773743 (D. Mass. June 2, 2023).

[485] MASS. GEN. LAWS ch. 149, § 148C(a).

[486] MASS. GEN. LAWS ch. 149, § 148C(d).

All employees whose primary place of work is Massachusetts are covered, unless an exception applies.[487] An employee is not required to spend 50% or more time working in Massachusetts, however, for Massachusetts to be the employee's primary place of work.[488]

Permitted Uses, Notice & Documentation. Employees are not entitled to use sick leave until the 90th calendar day after the employee's first date of work.[489] Employees are entitled to use 40 hours of sick leave per year for themselves or to care for a child, spouse, or parent for the following reasons:

- physical or mental illness, injury, or medical condition that requires home care;
- professional medical diagnosis or care;
- preventive medical care;
- routine medical appointments; or
- addressing physical and mental health needs if an employee or their spouse experiences pregnancy loss or a failed assisted reproduction, adoption or surrogacy (as of November 21, 2024).

Additionally, if an employee is a victim of domestic violence, sick leave can be used to address the psychological, physical, or legal effects of domestic violence.[490]

Whether used for sick or safe time purposes, sick leave can be used for travel to and from an appointment, a pharmacy, or other location related to the purpose for which leave was taken.

When the use of sick leave is foreseeable, employees must make a "good faith effort" to provide advance notice of the need to take leave.[491] For foreseeable or pre-scheduled use of earned sick time, the employer may have a written policy requiring up to seven days' notice, except where the employee learns of the need to use earned sick time within a shorter period. For multiday absences, an employer may require notification of the expected duration of the leave or, if unknown, then on a daily basis, unless the circumstances make such notice unreasonable.[492] For unforeseeable absences, employees must provide notice before leave is used—except in an emergency—but what constitutes reasonable notice depends on the circumstances.[493]

Employers may require employees to personally verify in writing they have used sick leave for a covered use.[494] An employer may require that an employee provide a doctor's note, or some other form of certification from a health care provider, if the employee is absent for more than 24 consecutively scheduled work hours.[495] However, the regulations provide other circumstances where documentation

[487] MASS. GEN. LAWS ch. 149, § 148C.

[488] MASS. GEN. LAWS ch. 149, § 148C; 940 MASS. CODE REGS. 33.03.

[489] MASS. GEN. LAWS ch. 149, § 148C(d).

[490] MASS. GEN. LAWS ch. 149, § 148C(c).

[491] MASS. GEN. LAWS ch. 149, § 148C(g).

[492] 940 MASS. CODE REGS. 33.05.

[493] 940 MASS. CODE REGS. 33.05.

[494] 940 MASS. CODE REGS. 33.03, 33.06.

[495] MASS. GEN. LAWS ch. 149, § 148C(f).

may be required, such as when the sick time occurs within two weeks of the employee's final scheduled day of employment or if it occurs after four unforeseeable and undocumented absences within a three-month period.[496] An employer may not require that the certification explain the nature of the illness or the details of the domestic violence.[497]

Accrual, Caps, Carry-Over, Cash Value & Cash-Out. Employers with paid time off policies equivalent to or more generous than the sick leave laws are not required to provide additional paid sick time. Otherwise, employees begin accruing sick leave on their first date of actual work, at a rate of one hour of sick leave for every 30 hours worked, up to a maximum of 40 hours per year. For accrual purposes, exempt executive, administrative, professional, and outside sales employees are assumed to work 40 hours per week unless their normal work week is less than 40 hours. Employees are entitled to carry over up to 40 hours of unused sick time to the next year. However, employers that provide employees with a lump sum of 40 hours or more of sick leave or paid time off at the beginning of each year do not need to allow carry-over.[498]

Sick leave must be paid at the employee's hourly rate, which cannot be less than the state minimum wage.[499] If paid a salary, the hourly rate is the employee's total earnings in the previous pay period divided by the total hours worked during that pay period.[500] For employees whose compensation includes commissions, whether paid a base wage plus commissions or commissions-only, the hourly rate is the base wage or the state minimum wage, whichever is greater.[501] Sick time must be paid on the same schedule as regular wages.[502]

Employers are not required to pay out unused sick time upon the separation of employment.[503]

Prohibitions. Employers cannot interfere with employees' sick leave rights. For example, employers cannot discipline an employee for sick leave usage or consider use of sick leave as a negative factor in employment decisions such as evaluation, promotion, or termination.[504] Employers are further prohibited from requiring an employee to make up hours missed because of a covered absence or requiring an employee to search for or find a replacement.[505] The law also prohibits retaliation because the employee opposes employer practices the employee believes to be in violation of the law, or because the employee supports the exercise of rights of another employee under the law, which includes providing information or testifying in any inquiry or proceeding relating to any right under the law.[506]

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496 940 MASS. CODE REGS. 33.06.

497 MASS. GEN. LAWS ch. 149, § 148C(f).

498 940 MASS. CODE REGS. 33.07.

499 MASS. GEN. LAWS ch. 149, § 148C.

500 940 MASS. CODE REGS. 33.02.

501 940 MASS. CODE REGS. 33.02.

502 940 MASS. CODE REGS. 33.03.

503 MASS. GEN. LAWS ch. 149, § 148C(d)(7).

504 MASS. GEN. LAWS ch. 149, § 148C(h).

505 MASS. GEN. LAWS ch. 149, § 148C(e).

506 MASS. GEN. LAWS ch. 149, § 148C(i).

Posting & Record Keeping. Under the law, employers are required to post a notice prepared by the attorney general. Employers are also required to provide employees with copies of the notice.[507]

Employers are required to maintain records related to sick leave accrual and use for at least three years. Such records must be open to inspection by the attorney general. Further, employers must allow employees to inspect their own records at reasonable times and places.[508]

State Enforcement, Remedies & Penalties. The state's attorney general can criminally and civilly enforce the law. In addition, employees, after first timely raising their claims with the attorney general, can bring their own lawsuits to address alleged violations. Employees who prevail in such lawsuits can recover compensatory damages, as well as mandatory awards of treble damages and attorneys' fees.[509]

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[510] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individuals with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for the employee's own serious health condition, such as severe morning sickness.[511] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

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[507] MASS. GEN. LAWS ch. 149, § 148C(o).

[508] MASS. GEN. LAWS ch. 149, § 148C(m); MASS. GEN. LAWS ch. 151, § 15.

[509] MASS. GEN. LAWS ch. 149, §150.

[510] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[511] 29 C.F.R. § 825.202.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[512] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**. To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

Under the Massachusetts fair employment practices law, employers of six or more employees must consider disabilities caused or contributed to by pregnancy, miscarriage, abortion, child birth, or recovery as temporary disabilities.[513] Employers must treat these disabilities like other temporary disabilities for all job-related purposes, including for purposes of any health or temporary disability insurance or sick leave plan available in connection with employment. "[E]mployment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal," must apply equally to any disability related to pregnancy or childbirth as they apply to other temporary disabilities.[514]

As described in **3.11(c)(ii)**, Massachusetts also requires employers to make reasonable accommodations for an employee's pregnancy or any condition related to the employee's pregnancy, including lactation.

3.9(c)(iii) *State Guidelines on Parental Leave*

Massachusetts has enacted a parental leave law available to both male and female employees.

Coverage & Eligibility. Massachusetts's parental leave law applies to employers with six or more employees. All full-time employees who have worked for the employer for three consecutive months will be eligible, including those who have completed three months of the employer's probationary period.[515]

Purpose & Length of Leave. Eligible employees have the right to receive up to eight weeks of unpaid leave for: (1) giving birth; (2) adopting a child under age18; (3) adopting a child under age 23 if the child is mentally or physically disabled; or (4) placement of a child with the employee pursuant to a court

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[512] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

[513] 804 MASS. CODE REGS. 8.01(3).

[514] 804 MASS. CODE REGS. 8.01(3).

[515] MASS. GEN. LAWS ch. 149, § 105D.

order. Two employees of the same employer are entitled to eight weeks of parental leave in aggregate for the birth or adoption of the same child.

If the employer provides parental leave for longer than eight weeks, the employer cannot deny the employee any rights afforded under the statute unless certain criteria are met. To enable denial of statutory rights in such a situation, the employer must clearly inform the employee in writing prior to the commencement of the parental leave, and prior to any subsequent extension of that leave, that taking longer than eight weeks of leave will result in the denial of reinstatement or loss of other rights and benefits.[516]

The Massachusetts Commission Against Discrimination (MCAD) takes the position that an eligible employee may take maternity leave each time the employee gives birth to a child. Accordingly, an employee who gives birth to twins is entitled to 16 weeks of leave.[517]

Employer Obligations. The employee must be restored to the employee's previous position or a similar position with the same status, pay, length of service credit, and seniority, wherever applicable, as of the date of the leave. The employer is not required to reinstate an employee on parental leave to the previous or a similar position if other employees of equal length of service credit and status in the same or similar position have been laid off due to economic conditions or other changes in operating conditions affecting employment during the parental leave. However, the employee on parental leave retains any preferential consideration for another position to which the employee may be entitled as of the date of the leave.[518]

Parental leave may be paid or unpaid at the employer's discretion. An employee on parental leave for the adoption of a child is entitled to the same benefits offered by the employer to an employee on parental leave for the birth of a child.

Use of parental leave does not affect the employee's right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans, or programs for which the employee was eligible at the date of the leave, along with any other advantages or rights of employment incidental to the position. Time spent on parental leave is not included, when applicable, in the computation of benefits, rights, and advantages. The employer is not required to provide for the cost of any benefits, plans, or programs during parental leave unless such employer so provides for all employees who are on leave of absence.[519]

Employers must post in a conspicuous location in the workplace a notice describing employee rights and obligations under the parental leave law, as well as a copy of any policies the employer maintains regarding the right to parental leave.[520]

Employers can post the MCAD's "Parental Leave Fact Sheet" with a copy of any employer-specific policies to satisfy its posting obligations under the statute.[521]

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[516] MASS. GEN. LAWS ch. 149, § 105D.

[517] *See, e.g.*, Massachusetts Comm'n Against Discrimination, *Maternity Leave Act Guidelines, I-IV*, *available at* http://www.mass.gov/mcad/resources/employers-businesses/emp-guidelines-maternity1-gen.html.

[518] MASS. GEN. LAWS ch. 149, § 105D.

[519] MASS. GEN. LAWS ch. 149, § 105D.

[520] MASS. GEN. LAWS ch. 149, § 105D.

Employee Rights & Obligations. Employees must give at least two weeks' notice of an anticipated departure date and intention to return, or provide notice as soon as practicable if the delay is for reasons beyond the individual's control.[522]

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the FMLA. For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

An employee may take parental leave when adopting a child under the age of 18 or adopting a child under the age of23, if the child is mentally or physically disabled.[523] Adoptive parents leave may be paid or unpaid, although an employee on parental leave for the adoption of a child is entitled to the same benefits offered by the employer to an employee on parental leave for the birth of a child. For a more in-depth discussion of Massachusetts's law on parental leave, see 3.9(c)(iii).

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(e)(ii) *State Guidelines on School Activities Leave*

Under the Massachusetts Small Necessities Leave Act (SNLA), employers subject to the federal FMLA must grant employees who are eligible for FMLA leave a total of 24 hours of unpaid leave during any 12-month period to allow such employees to:

- participate in school activities directly related to the educational advancement of their child;
- accompany a son or daughter to routine medical or dental appointments; or
- accompany an elderly relative (at least 60 years old related by blood or marriage) to routine medical or dental appointments or appointments for other professional services related to the elder's care.[524]

Leave may be taken intermittently or on a reduced schedule basis. If the need for leave is foreseeable, the employee must provide at least seven days' notice before the date the leave is to begin. If the need for a leave is not foreseeable, the employee must provide such notice as is practicable. An employee may elect, or the employer may require, use of paid vacation leave, personal leave, or medical or sick leave for any leave under this section. The SNLA does not require an employer to provide paid sick leave or medical leave in any situation in which the employer would not normally provide such paid leave.[525]

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[521] The fact sheet is available at www.mass.gov/mcad/docs/parental-leave-fact-sheet.pdf.

[522] MASS. GEN. LAWS ch. 149, § 105D.

[523] MASS. GEN. LAWS ch. 149, § 105D.

[524] MASS. GEN. LAWS ch. 149, § 52D.

[525] MASS. GEN. LAWS ch. 149, § 52D.

An employer may require that leave be supported by a written certification signed by the employee including the date on which leave will be taken, the duration of the leave, the purpose of requesting the leave, and the employee's signature. An employer may require that the certification be provided at the time the employee gives notice of the need for leave or within two business days thereafter. When the need for a leave is unforeseen, certification must be given within two business days after the leave was taken or as soon thereafter as is practicable. The employer may require additional information so long as the request is reasonable.[526]

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

Massachusetts law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(g)(ii) *State Voting Time Guidelines*

In Massachusetts, an employer must provide employees in any manufacturing, mechanical, or mercantile establishment up to two hours off to vote if they request it. Employees do not have to be paid for this time.[527]

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

Massachusetts law does not address leave for private-sector employees to participate in political activities.

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[528] Employers are under no federal statutory obligation to pay employees while serving on a jury.

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[526] MASS. GEN. LAWS ch. 149, § 52D; 940 MASS. CODE REGS. 20.01 *et seq*.

[527] MASS. GEN. LAWS ch. 149, § 178.

[528] 28 U.S.C. § 1875.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[529] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. Massachusetts employers may not discharge or deprive an employee of employment or any benefits because of jury service. They also may not harass, threaten, or coerce an employee because the employee has received a jury summons, responds to a jury summons, or serves as a juror.[530] Additionally, an employer must pay wages to a "regular employee" during the first three days, or part thereof, of the employee's service on a jury. *Regular employment* includes temporary, part-time, and casual employment.[531] A court may excuse an employer from the obligation to compensate an employee-juror, if the employer would suffer extreme financial hardship.[532]

Employers also may not commit any intentional act (*e.g.*, require employees to work each morning before reporting to jury duty) that would substantially interfere with the availability, effectiveness, or alertness of the employee during jury service.[533] If an employee works the night shift the employee may not: (1) be required to work beyond midnight the night before the first day of jury service; (2) work while the employee is impaneled on a trial unless authorized by the judge; or (3) be required to work on their last day of service if released by the court after 4:00 p.m.

Leave to Comply With a Subpoena. An employee who gives notice is eligible for time off if the employee is a victim of a crime or is a subpoenaed witness of a crime upon which an accusatory instrument is based. Employers may not penalize or discharge employees for such witness service.[534]

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

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[529] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

[530] MASS. GEN. LAWS ch. 234A, § 61.

[531] MASS. GEN. LAWS ch. 234A, § 48.

[532] MASS. GEN. LAWS ch. 234A, § 49.

[533] MASS. GEN. LAWS ch. 234A, §§ 48, 49, 55, 61; MASS. GEN. LAWS ch. 268, § 14A; Massachusetts Office of Jury Comm'r, *Regulation IV: Night-Shift Work Assignments During Juror Service*, Reg. IV §§ 4.1 *et seq*., *available at* https://www.mass.gov/office-of-jury-commissioner-regulations/office-of-jury-commissioner-regulation-4-night-shift-work; *see also John Bath & Co. v. Commonwealth*, 202 N.E.2d 249 (Mass. 1964).

[534] MASS. GEN. LAWS ch. 268, § 14B.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Massachusetts has enacted a leave law for employees affected by domestic violence. Covered employers must permit victims of abusive behavior up to 15 days of leave in any 12-month period.

Coverage & Eligibility. The Massachusetts domestic violence leave law applies to employers of 50 or more employees. To be eligible for leave, the employee or a family member of the employee must be a victim of abusive behavior, and the employee must not have been the perpetrator of the abusive behavior against the family member.[535]

Permitted Uses, Notice & Documentation. An eligible employee may take up to 15 days of leave in any 12-month period to:

- seek or obtain medical attention, counseling, victim services, or legal assistance;
- secure housing;
- obtain a protective order from a court;
- appear in court or before a grand jury;
- meet with a district attorney or other law enforcement official; or
- attend child custody proceedings or address other issues directly related to the abusive behavior against the employee or the employee's family member.[536]

Family member includes any of the following: (1) spouses; (2) people engaged or in a substantive dating relationship and who reside together; (3) people having a child in common; (4) a parent, stepparent, child, stepchild, sibling, grandparent, or grandchild; or (5) persons in a guardianship relationship.[537]

Leave may be paid or unpaid at the employer's discretion. An employee must exhaust all available vacation leave, personal leave, and sick leave prior to taking leave under this law, unless the employer waives this requirement.[538]

An employee seeking leave must provide appropriate advance notice of the leave as required by the employer's leave policy, except in cases of imminent danger to the health or safety of an employee or the employee's family member. If there is a threat of imminent danger, the employee will not be required to provide advance notice. However, the employee must notify the employer within three workdays that the leave is being taken due to an incident of domestic violence or abuse.[539]

An employer may require an employee to provide documentation to show that the employee or employee's family member has been a victim of abusive behavior within a reasonable time of the employer's request. The employee is not required to produce any documentation showing evidence of an arrest, conviction, or other law enforcement documentation for such abusive behavior. The

[535] MASS. GEN. LAWS ch. 149, § 52E.

[536] MASS. GEN. LAWS ch. 149, § 52E(b).

[537] MASS. GEN. LAWS ch. 149, § 52E(a).

[538] MASS. GEN. LAWS ch. 149, § 52E(g).

[539] MASS. GEN. LAWS ch. 149, § 52E(d).

documentation provided may be kept in employee's employment record only for as long as required to make a determination whether the employee is eligible for leave.[540]

Employer Obligations. Upon return from leave, the employer must restore the employee to their original job or to an equivalent position. Taking leave cannot result in the loss of any employment benefit accrued prior to the date the leave commenced.[541]

Employers are also prohibited from coercing, interfering with, restraining or denying the exercise of, or any attempt to exercise, any rights provided under the law, or from discharging or taking other adverse action against an employee for taking leave. Additionally, employers are prohibited from making the leave contingent upon whether or not the victim maintains contact with the alleged abuser.[542]

All information related to the employee's leave under must be kept confidential by the employer and may not be disclosed with the following exceptions:

- the employee requests or consents to disclosure in writing;
- the information is ordered to be released by a court of competent jurisdiction;
- disclosure is otherwise required by applicable federal or state law;
- disclosure is required in the course of an investigation authorized by law enforcement, including, but not limited to, an investigation by the attorney general; or
- disclosure is necessary to protect the safety of the employee or others employed at the workplace.[543]

Covered employers must notify each employee of the rights and responsibilities provided under this law, including those related to certification requirements and confidentiality.[544] The notice is included in the current Massachusetts Wage & Hour Laws poster.[545]

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA

[540] MASS. GEN. LAWS ch. 149, § 52E(e).

[541] MASS. GEN. LAWS ch. 149, § 52E(i).

[542] MASS. GEN. LAWS ch. 149, § 52E(h).

[543] MASS. GEN. LAWS ch. 149, § 52E(f).

[544] MASS. GEN. LAWS ch. 149, § 52E(k).

[545] This poster is available at http://www.mass.gov/ago/docs/workplace/wage/wagehourposter.pdf.

guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[546]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.547 An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.548 Notably, leave is only available for covered relatives of military members called to active federal service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.
2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

Military Service Leave. Members of the armed forces of the Commonwealth, including the state defense force, the state staff, or the armed forces of another state or territory who are employed within the Commonwealth and ordered to active duty under state or federal law, are entitled to all rights, protections, privileges, and immunities, including a leave of absence due to military service, afforded under USERRA.[549]

An employee who is a veteran and who wants to participate in a Memorial Day exercise, parade, or service or observe Veterans Day must be allowed a leave of absence, with or without pay at the

[546] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

[547] 29 C.F.R. § 825.126(a).

[548] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

[549] MASS. GEN. LAWS ch. 33, § 13.

discretion of the employer, of sufficient time to participate in such services in their community of residence.

Family Military Leave. Like the federal FMLA, the Massachusetts family and medical leave law provides family leave to employees who have covered family members in the armed forces. As discussed in **3.9(a)(ii)**, Massachusetts enacted this law to provide eligible employees with paid family and medical leave benefits.[550]

Family military leave is available under the Massachusetts paid family and medical leave law to an eligible employee for the following reasons:

- because of any qualifying exigency arising out of the fact that the employee's family member is on active duty or has been notified of an impending call or order to active duty in the armed forces; or
- in order to care for a family member who is a covered servicemember.[551]

Family member means the spouse, domestic partner, child, parent or parent of a spouse or domestic partner of the covered individual; a person who stood in loco parentis to the covered individual when the covered individual was a minor child; or a grandchild, grandparent or sibling of the covered individual.[552]

Covered servicemember means either:

- a member of the armed forces, including a member of the National Guard or reserves, who is:
  - undergoing medical treatment, recuperation, or therapy;
  - otherwise in outpatient status; or
  - is otherwise on the temporary disability retired list for a serious injury or illness that was incurred by the member in the line of duty on active duty in the armed forces, or a serious injury or illness that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the armed forces; or
- a former member of the armed forces, including a former member of the National Guard or reserves, who is undergoing medical treatment, recuperation or therapy for a serious injury or illness that was incurred by the member in line of duty on active duty in the armed forces, or a serious injury or illness that existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the armed forces and manifested before or after the member was discharged or released from service.[553]

Qualifying exigency means a need arising out of an employee's family member's active duty service or notice of an impending call or order to active duty in the armed forces, including, but not limited to, providing for the care or other needs of the military member's child or other family member, making

[550] MASS. GEN. LAWS ch. 175M, § 1.

[551] MASS. GEN. LAWS ch. 175M, § 2(a)(1).

[552] MASS. GEN. LAWS ch. 175M, § 1.

[553] MASS. GEN. LAWS ch. 175M, § 1.

financial or legal arrangements for the military member, attending counseling, attending military events or ceremonies, spending time with the military member during a rest and recuperation leave or following return from deployment or making arrangements following the death of the military member.[554]

An employee taking family leave due to a qualifying exigency is not eligible for more than 12 weeks of family leave due in a benefit year. An employee taking family leave in order to care for a covered servicemember is not eligible for more than 26 weeks of family leave in a benefit year. An employee may not take more than 26 weeks, in the aggregate, of family and medical leave in the same benefit year.[555]

Benefit year means the period of 52 consecutive weeks beginning on the Sunday immediately preceding the first day that job-protected paid family and medical leave commences for the employee.[556]

All claims for paid family and medical leave benefits must include supporting certification. Willfully providing a false statement or representation or withholding material facts will result in the employee becoming ineligible for benefits.[557]

Certification for an employee taking family leave because of a qualifying exigency is sufficient if it includes:

- a copy of the family member's active-duty orders;
- other documentation issued by the armed forces; or
- other documentation permitted by the Department of Family and Medical Leave.[558]

Certification for an employee taking family leave to care for a family member who is a covered servicemember is sufficient if it includes:

- the date on which the serious health condition commenced;
- the probable duration of the condition;
- the appropriate medical facts within the knowledge of the servicemember's health care provider as required by the Department;
- a statement that the employee is needed to care for the family member;
- an estimate of the amount of time that the employee is needed to care for the family member; and
- an attestation by the employee that the health condition is connected to the covered servicemember's military service.[559]

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[554] MASS. GEN. LAWS ch. 175M, § 1.

[555] MASS. GEN. LAWS ch. 175M, § 2(c).

[556] MASS. GEN. LAWS ch. 175M, § 1.

[557] MASS. GEN. LAWS ch. 175M, § 5(a)(1), (c).

[558] MASS. GEN. LAWS ch. 175M, § 5(a)(6).

[559] MASS. GEN. LAWS ch. 175M, § 5(a)(7).

Leave is paid; an employee using family military leave must apply to the Department of Family and Medical Leave to receive paid family leave benefits. Refer to **3.9(a)(ii)** for details on an employer's obligations to provide continuation of health benefits and other fringe benefits during leave, as well as an employee's right to reinstatement at the conclusion of the leave.

Other Military-Related Protections: Spousal Unemployment. While not restricted to just military service, Massachusetts will allow unemployment benefits in the event that an individual had to leave work to "accompany or join one's spouse or another person at a new locality" once the individual has had: (1) at least eight weeks of work; and (2) in each of those weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount.[560]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(l)(ii) *State Guidelines on Other Leaves*

Volunteer Firefighters. A Massachusetts employer may not discharge or otherwise discriminate against an employee who fails to report to work while responding to an emergency as a volunteer firefighter. The leave may be unpaid. The employee must, upon request, provide a statement from the chief certifying the date, time, and employee's response to the emergency.[561]

Veterans. Any employee who is a veteran or a member of a department of war veterans (as defined under Massachusetts law) that wants to participate in a Memorial Day exercise, parade, or service must be allowed a leave of absence, with or without pay at the employer's discretion, of sufficient time to participate in such services in their community. This requirement does not apply to employees whose services are essential and critical to the public health or safety or to employees whose services are essential to the safety and security of the employer or its property. Employees that are veterans or members of a department of war veterans are also granted time off, with or without pay, to observe Veterans Day.[562]

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[563] Employers are also required to comply with all applicable occupational safety and health

[560] MASS. GEN. LAWS ch. 151A, §25.

[561] MASS. GEN. LAWS ch. 149, § 177B.

[562] MASS. GEN. LAWS ch. 149, § 52A1/2.

[563] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

standards.[564] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see LITTLER ON WORKPLACE SAFETY.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[565] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

Massachusetts does not have an approved state plan under the Fed-OSH Act that covers public or private-sector employees. Accordingly, employers must abide by the Fed-OSH Act.

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

In Massachusetts, a driver may not operate a motor vehicle while using a mobile telephone, or any handheld device capable of using the internet, to manually compose, send, or read an electronic message.[566]

The state prohibits all cell phone use while driving, except while in hands-free mode. *Hands-free mode* is the operation of a mobile electronic device where a user engages in a voice communication or receives audio without touching or holding the device. The mobile electronic device may require a single tap or swipe to activate, deactivate, or initiate the hands-free mode feature.[567] The law further prohibits a driver from reading or viewing text, images, or video displayed on a mobile electronic device. However, a driver may view a map generated by a navigation system or application on a mobile electronic device that is mounted on or affixed to the vehicle in a manner that does not impede the operation of the vehicle. A driver is not considered to be operating a motor vehicle if the vehicle is stationary and not located in a part of the public way intended for travel.[568]

These prohibitions apply to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the restrictions.

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[564] 29 U.S.C. § 654(a)(2).

[565] 29 U.S.C. § 667(c)(2).

[566] MASS. GEN. LAWS ch. 90, § 13B.

[567] MASS. GEN. LAWS ch. 90, § 1.

[568] MASS. GEN. LAWS ch. 90, § 13B.

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

Massachusetts does not have a statute specifically addressing the possession or storage of firearms in the workplace or in company parking lots.

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

Smoking is prohibited in enclosed workplaces in Massachusetts. Outdoor smoking areas may be established if:

- the area is physically separated from the enclosed workspace;
- the area is open to the air at all times; and
- smoke does not migrate back into the workplace.[569]

Posting Requirements. "No smoking" signs must be posted conspicuously where smoking is regulated.

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

In Massachusetts, employers must provide suitable seats for the use of employees and must permit employees to use seats whenever they are not necessarily engaged in active duties of employment. Employers must also provide for seat use, and permit employees to use suitable seats while at work, except when the work cannot properly be performed in a sitting position or when seats may reasonably be expected to result in an unsafe or hazardous working condition.[570]

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

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[569] MASS. GEN. LAWS ch. 270, § 22.

[570] MASS. GEN. LAWS ch. 149, § 103.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

Massachusetts law does not address employer workplace violence protection orders.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[571] (2) the Americans with Disabilities Act (ADA);[572] (3) the Age Discrimination in Employment Act (ADEA);[573] (4) the Equal Pay Act;[574] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[575] (6) the Civil Rights Acts of 1866 and 1871;[576] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[577]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[578] Employees must first exhaust their administrative remedies by

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[571] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[572] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[573] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[574] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. §203.

[575] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[576] 42 U.S.C. §§ 1981, 1983.

[577] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

[578] The EEOC's website is available at http://www.eeoc.gov/.

filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[579]

3.11(a)(ii) *State FEP Protections*

Massachusetts's comprehensive fair employment practices law is Massachusetts General Laws Chapter 151B ("Chapter 151B"). Chapter 151B is closely analogous to federal law in many respects. However, state law provides greater substantive protection in some instances. Nonetheless, as a general rule, Massachusetts courts routinely look to federal decisions under Title VII for guidance in ruling upon matters arising under Massachusetts law.

In Massachusetts, it is a discriminatory employment practice for an employer to refuse to hire, discharge, or discriminate against any individual in compensation or in the terms, conditions, or privileges of employment because of that individual's:

- race;
- color;
- religious creed;
- national origin or ancestry;
- sex;
- gender identity;
- sexual orientation;
- genetic information;
- age, if the individual is 40 years of age or older;
- handicap (disability discrimination is referred to as "handicap discrimination" under Chapter 151B);
- veteran or military status; or
- natural or protective hairstyles, defined as hair texture, hair type and hairstyles, including but not limited to natural and protective hairstyles such as braids, locs, twists, Bantu knots, and other formations.[580]

The antidiscrimination protections in Chapter 151B apply to all employers in Massachusetts with six or more employees. The term *employer* does not include a social club or a fraternal association or corporation, if such club, association, or corporation is not organized for profit.[581]

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[579] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

[580] MASS. GEN. LAWS ch. 151B, §§ 1, 3, 4(1), 4(1B), 4(1D), and 4(16); H.B. 4554 (Mass. 2022). Handicap and age are not included alongside the other "protected classifications" in all of Chapter 151B's unlawful employment practices provisions, but they are in some and have their own standalone antidiscrimination provisions. Moreover, additional age antidiscrimination provisions in contracts exist outside the fair employment practices laws.

[581] MASS. GEN. LAWS ch. 151B, § 1.

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

Agency Enforcement. The Massachusetts Commission Against Discrimination (MCAD) enforces Chapter 151B.[582] The deadline for filing a claim with the MCAD is 300 days.[583] However, the MCAD and Massachusetts courts recognize the *continuing violation* doctrine, thus allowing claims based on conduct occurring more than 300 days prior to the filing where the conduct complained of is of a continuing nature and where at least one act occurred within the 300-day filing period.[584]

Request for Agency Action. After the filing of any complaint, the MCAD designates one of the commissioners to investigate. If the commissioner determines that no probable cause exists for crediting the allegations of the complaint, the commission must, within 10 days from that determination, notify the complainant in writing of that conclusion. The complainant may, within 10 days after service, file with the commission a written request for a preliminary hearing to determine probable cause.[585]

If the commissioner determines, after investigation or preliminary hearing, that there is probable cause in support of the complaint, and if no party has elected judicial determination of the matter, the commissioner must immediately attempt to eliminate the unlawful practice through conference, conciliation, and persuasion.[586]

Answer & Hearings. If those efforts are unsuccessful, the commissioner may require the respondent to answer the charges at a hearing before the commission. If, upon all the evidence presented at the hearing, the commission finds that a respondent has engaged in any unlawful practice, the commission will state its findings of fact and issue an order requiring such respondent to cease and desist from such unlawful practice or violation.

Remedies & Penalties. The remedies under Chapter 151B include equitable remedies (*e.g.*, reinstatement, promotion), compensatory damages (front and back pay, lost benefits, etc.), emotional distress damages, punitive damages (in court, but not before the MCAD), interest, and reasonable attorneys' fees. Chapter 151B's remedies, including unlimited punitive and general compensatory damages in all but age cases, are more generous than the remedies provided under federal law. Whereas under Title VII, plaintiffs are limited in general compensatory and punitive damages,[587] damages are not capped under Chapter 151B. Additionally, under the ADEA, a plaintiff may recover double or "liquidated damages."[588] However, Chapter 151B allows for treble damages in age cases upon a showing of willful violation.[589]

If the commission finds a respondent has engaged in any unlawful practice, it may, in addition to any other action, assess a civil penalty of up to $10,000 for a first violation. This penalty may rise to $25,000 if the respondent has been adjudged to have committed one other discriminatory practice during the

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582 MASS. GEN. LAWS ch. 6, § 56; MASS. GEN. LAWS ch. 151B, § 5.

583 MASS. GEN. LAWS ch. 151B, § 5.

584 804 MASS. CODE REGS. 1.10(2).

585 MASS. GEN. LAWS ch. 151B, § 5.

586 MASS. GEN. LAWS ch. 151B, § 5.

587 42 U.S.C. § 1981a(b)(3)(A)-(D).

588 29 U.S.C. § 626(b).

589 MASS. GEN. LAWS ch. 151B, § 9.

five-year period ending on the date of the filing of the complaint, or up to $50,000 if it was found to have committed two or more discriminatory practices during the seven-year period prior to the date of the complaint.[590]

There are additional penalties for posting or record-keeping violations,[591] as well as for certain discriminatory conduct against individuals based on military status or age.[592]

Confidentiality. The members of the commission and its staff may not disclose what has occurred in the course of an investigation. That being said, the commission may publish the facts in the case of any complaint that has been dismissed, and the terms of conciliation for resolved complaints.[593]

Exclusivity of Remedy. Chapter 151B requires that a person aggrieved by a discriminatory employment act must exhaust their administrative remedies by filing a charge of discrimination with the MCAD before filing a civil action. The complainant is allowed to remove their claim from the MCAD process after 90 days have elapsed since filing the charge and to initiate a civil action.[594]

3.11(a)(iv) *Local FEP Protections*

In addition to the federal and state laws, employers with operations in Boston, Cambridge, and Worcester are subject to local fair employment practices ordinances.

- **Boston.** Any individual, partnership, association, corporation, trustees, public charity, foundation, political subdivision, board, department, commission, agency, or any other person which engages and controls the services of an individual in the City of Boston in exchange for monetary or other valuable consideration, and that employs more than six persons (exclusive of parents, spouse, or children) are subject to the following antidiscrimination protections: religious creed; race; color; sex; gender identity or expression; age (40-65 years of age); disability; national origin; ex-offender status; prior psychiatric treatment; sexual orientation; military status; marital status; parental status; ancestry; and source of income.[595] Any aggrieved individual may file a verified written complaint with the Boston Human Rights Commission within 180 days after the occurrence of the alleged discriminatory practice, unless the complaint has been referred to the

[590] MASS. GEN. LAWS ch. 151B, § 5.

[591] MASS. GEN. LAWS ch. 151B, § 7 (posting fine between $10 and $100; if a subsequent violation occurs within 60 days from a prior conviction for a posting violation, the fine rises to between $100 and $1,000); MASS. GEN. LAWS ch.149, § 24D (fine between $25 and $100, with each day of failure as a separate offense, for a violation of the age discrimination record-keeping provisions).

[592] MASS. GEN. LAWS ch. 33, § 13 (unlawful discrimination based on military status is punishable by a fine of up to $500, imprisonment up to six months, or both); MASS. GEN. LAWS ch. 149, § 24A (refusing to employ or dismissing from private-sector employment an individual over 40 years of age, subject to certain exceptions, will be fined up to $500).

[593] MASS. GEN. LAWS ch. 151B, § 5.

[594] MASS. GEN. LAWS ch. 151B, § 9.

[595] CITY OF BOSTON MUN. CODE §§ 12-9.2 (definitions, exception to definition of employer includes a "club exclusively social" or a fraternal association or religious organization, incorporated or unincorporated, if such organization is not incorporated for profit and if the primary function is religious or fraternal), 12-9.3 (exceptions for *bona fide* occupational qualifications and certain religious or denominational organizations and institutions).

Commission by the MCAD or the federal EEOC after having been timely filed with either or both of these agencies.[596]

- **Cambridge.** Employers employing six or more individuals must extend antidiscrimination protections on the basis of: race; color; sex; age (18 years or older); religious creed; disability; national origin or ancestry; sexual orientation; gender; marital status; family status; military status; and source of income.[597] Every employer with 100 or more employees is also subject to a workplace poster requirement.[598] Any person or class of persons alleging a violation may file a verified complaint with the Cambridge Human Rights Commission within 180 days after the occurred of the alleged unlawful practice, unless the complaint has been referred to the Commission by the MCAD or the federal EEOC after having been timely filed with either or both of these agencies.[599]
- **Worcester.** Protected classifications include: race; color; religious creed; national origin; sex; gender identity; sexual orientation; genetic information; ancestry; disability; and source of income.[600] An individual alleging a violation of the ordinance may file a complaint with the Worcester Human Rights Commission. Worcester's City Code does not provide a definition of a covered employer and the ordinance does not provide a statute of limitations for filing.

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[601] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[602]

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[596] CITY OF BOSTON MUN. CODE § 12-9.12.

[597] CAMBRIDGE, MASS., CODE OF ORDINANCES §§ 2.76.030 (definitions), 2.76.120 (exceptions, including religious institutions and *bona fide* occupational qualifications).

[598] CAMBRIDGE, MASS., CODE OF ORDINANCES § 2.76.110.

[599] CAMBRIDGE, MASS., CODE OF ORDINANCES § 2.76.150.

[600] WORCESTER, MASS., CITY CODE art. 10, § 18.

[601] 29 U.S.C. § 206(d)(1).

[602] 42 U.S.C. § 2000e-5.

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

The Massachusetts Equal Pay Act (MEPA), as amended by the Massachusetts Act to Establish Pay Equity, currently governs equal pay for comparable work between the sexes.[603] It prohibits employers from discriminating in any way in the payment of wages for men and women for "work of like or comparable character or work on like or comparable operations."[604] If two jobs have similar duties, and require comparable skill and effort, then men and women must be paid equally for these jobs.[605]

Under the law, *comparable work* is "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions."[606] The law also expressly provides that "a job title or job description alone shall not determine comparability."[607] Thus, *comparable work* is not limited to employees who have the same job title.

An employer will not be held liable if it can demonstrate that a pay difference for comparable work is based on one or more of the following factors:

- a *bona fide* seniority system, provided that time spent on leave due to a pregnancy-related condition and protected parental, family, and medical leave, will not reduce seniority;
- a *bona fide* merit system;
- a *bona fide* system that measures earnings by quantity or quality of production or sales;
- the geographic location in which a job is performed;
- education, training, or experience to the extent such factors are reasonably related to the particular job in question and consistent with business necessity; or
- travel, if the travel is a regular and necessary condition of the particular job.[608]

Importantly, employers may not attempt to remedy an unlawful wage differential by lowering the wages of any employee.

An employer that completes a good-faith self-evaluation of its pay practices within three years of a previous claim for equal pay violations, and can demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender, has an affirmative defense to liability for an equal pay violation. Relevant factors include whether the evaluation includes a reasonable number of jobs and employees; whether the evaluation takes into account all reasonably relevant and available information; and whether the evaluation is reasonably sophisticated in its analysis of potentially comparable jobs, employee compensation, and the application of the permissible reasons for pay disparities. If an employer's self-evaluation is found to be insufficient in detail or scope, but was nonetheless conducted in good faith, and the employer has made reasonable progress toward

[603] MASS. GEN. LAWS ch. 149, § 105A.

[604] MASS. GEN. LAWS ch. 149, § 105A.

[605] *Jancey v. School Comm. of Everett*, 695 N.E.2d 194 (Mass. 1998).

[606] MASS. GEN. LAWS ch. 149, § 105A(a).

[607] MASS. GEN. LAWS ch. 149, § 105A(a).

[608] MASS. GEN. LAWS ch. 149, § 105A(b).

eliminating identified pay disparities, the employer will not be required to pay liquidated damages to an affected employee or employees.[609]

Unlike the Massachusetts antidiscrimination statute, the MEPA does not require that a plaintiff prove there was any intent to discriminate based on sex.[610] On the other hand, at least under interpretations of the pre-amendment MEPA, a plaintiff must show that comparable positions actually received unequal compensation; even where an employer sets pay arbitrarily, a plaintiff must still prove that there was a disproportionate impact on women.[611]

Unlike the exclusive nature of Chapter 151B, the Massachusetts Supreme Judicial Court has held that Chapter 151B will not bar a claim under the MEPA.[612]

Beginning July 31, 2025, the MEPA includes pay range disclosure provisions.[613] A covered employer, or the employer's agent, must disclose the pay range for a particular and specific employment position in the posting for the position. Covered employers are those with 25 or more employees in the commonwealth. "Pay range" means the annual salary range or hourly wage range that the employer reasonably and in good faith expects to pay for the position at that time. "Posting" means any advertisement or job posting intended to recruit job applicants for a particular and specific employment position, including but not limited to recruitment done directly by an employer or indirectly through a third party.[614]

A covered employer, or its agent, must provide the pay range for a particular and specific employment position to:

- an employee who is offered a promotion or transfer to a new position with different job responsibilities; and
- an employee holding the position, or to an applicant for the position, upon request.[615]

An employer found to be in violation of these provisions is subject to penalties of up to $1,000, as well as enforcement action by the state attorney general. Through July 31, 2027, an employer will have two business days after notice of a violation to cure any defect before a fine is imposed.[616]

MEPA also includes prohibitions on inquiries regarding salary history and wage transparency provisions, discussed in **1.3(f)(ii)** and **3.7(b)(v)**, respectively.

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609 MASS. GEN. LAWS ch. 149, § 105A; Massachusetts Office of the Attorney General, *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, available at http://www.mass.gov/files/documents/2018/03/01/AGO%20Equal%20Pay%20Act%20Guidance.pdf.

610 *Jancey*, 695 N.E.2d 194.

611 *Silvestris v. Tantasqua Reg'l Sch. Dist.*, 847 N.E.2d 328 (Mass. 2006).

612 *Jancey v. School Comm. of Everett*, 695 N.E.2d 194 (Mass. 1998).

613 MASS. H.B. 4890 (2024).

614 MASS. GEN. LAWS ch. 149, § 105F.

615 MASS. GEN. LAWS ch. 149, § 105F.

616 MASS. GEN. LAWS ch. 149, § 105F.

Enforcement, Remedies & Penalties. An employee alleging a violation under MEPA may bring a civil action for unpaid wages within three years of the alleged violation.[617] Further, a *violation* will be defined to occur whenever a discriminatory compensation practice occurs, including each time wages are paid. An employee will not be required to exhaust administrative remedies by filing a charge with the MCAD prior to filing suit. If an employer violates the equal pay provisions, it is liable to the employee affected in the amount of the employee's unpaid wages, and in an additional equal amount of liquidated damages. Attorneys' fees and costs are also available. The attorney general also has authority to bring an action to collect unpaid wages on behalf of one or more employees.

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[618]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;

[617] MASS. GEN. LAWS ch. 149, § 105A.

[618] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[619]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[620] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[621] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[622]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and

[619] 29 C.F.R. § 1636.3.

[620] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[621] 29 C.F.R. § 1636.3.

[622] 29 C.F.R. § 1636.4.

- the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[623]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[624]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

The Massachusetts Pregnant Workers' Fairness Act requires an employer of six or more employees to provide reasonable accommodation for an employee's pregnancy or any condition related to the employee's pregnancy, including but not limited to lactation, if the employee requests accommodation.[625] An employer will not be required to provide reasonable accommodation if the employer can demonstrate that the accommodation would impose an undue hardship on the employer's program, enterprise, or business.

Reasonable accommodation may include, but is not limited to:

- more frequent or longer paid or unpaid breaks;
- time off to recover from childbirth with or without pay;
- acquisition or modification of equipment or seating;
- temporary transfer to a less strenuous or hazardous position;
- job restructuring;
- light duty;
- private nonbathroom space for expressing breast milk;
- assistance with manual labor; or

[623] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[624] 29 C.F.R. § 1636.3.

[625] MASS. GEN. LAWS ch. 151B, § 1E(a).

- modified work schedules.[626]

An employer is not required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not able to perform the essential functions of the job, with or without a reasonable accommodation.

Under the new law, employers are prohibited from:

- taking adverse action against an employee who requests or uses a reasonable accommodation in the terms, conditions or privileges of employment, including but not limited to failing to reinstate the employee to the original employment status or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other applicable service credits when the need for reasonable accommodations ceases;
- denying an employment opportunity to an employee, if the denial is based on the employer's need to make a reasonable accommodation to the known conditions related to the employee's pregnancy;
- requiring an employee to accept an accommodation that the employee chooses not to accept, if the accommodation is unnecessary to enable the employee to perform the essential functions of the job;
- requiring an employee to take leave of absence if another reasonable accommodation may be provided without undue hardship to the employer; or
- refusing to hire a person who is pregnant because of the individual's pregnancy or a condition related to pregnancy, if the person is capable of performing the essential functions of the position involved with a reasonable accommodation, unless the employer is able to demonstrate that the accommodation would impose an undue hardship on the employer's program, enterprise, or business.[627]

An employer may require an employee to provide documentation supporting the need for a reasonable accommodation from an appropriate health care or rehabilitation professional. However, an employer may not require, and an employee is not required to obtain, documentation from an appropriate health care or rehabilitation professional for the following accommodations: more frequent restroom, food, and water breaks; seating; and limits on lifting over 20 pounds.[628] An employer may also require documentation for an extension of the accommodation beyond the originally agreed to accommodation.

The employer and employee or prospective employee must engage in a timely, good faith, and interactive process to determine effective reasonable accommodations to enable the individual to perform the essential functions of the job.[629]

[626] MASS. GEN. LAWS ch. 151B, § 4.

[627] MASS. GEN. LAWS ch. 151B, § 1E(a).

[628] MASS. GEN. LAWS ch. 151B, § 1E(c).

[629] MASS. GEN. LAWS ch. 151B, § 1E(c).

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[630] Multiple decisions of the U.S. Supreme Court[631] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[632] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see LITTLER ON HARASSMENT IN THE WORKPLACE and LITTLER ON EMPLOYEE TRAINING.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

Chapter 151B, Massachusetts's fair employment practices law encourages employers to conduct an education and training program on harassment and discrimination to all new employees and new supervisors and other managers within one year of hiring or promotion.[633]

Employers with six or more employees are required to prepare and provide all employees with an individual, written copy of the employer's policy against sexual harassment on an annual basis, with new employees being provided copies of the policy when they start employment.[634] The term *employer* does not include nonprofit social, fraternal, or religious organizations.[635]

The policy against sexual harassment must include the following:

- a statement that sexual harassment in the workplace is unlawful;
- a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of a complaint for sexual harassment;
- a description and examples of sexual harassment;
- a statement of the range of consequences for employees who are found to have committed sexual harassment;

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[630] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[631] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

[632] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

[633] MASS. GEN. LAWS ch. 151B, § 3A(e).

[634] MASS. GEN. LAWS ch. 151B, § 3A.

[635] MASS. GEN. LAWS ch. 151B, § 1.

- a description of the process for filing internal complaints about sexual harassment and the work addresses and telephone numbers of the person(s) to whom complaints should be made; and
- the identity of the appropriate state and federal employment discrimination enforcement agencies, and directions as to how to contact such agencies.[636]

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

Massachusetts does not have a general whistleblower law addressing protections for private-sector whistleblowers, although there are whistleblower protections for public employees.[637] In addition, Massachusetts has a state False Claims Act that further prohibits employers from making rules or policies preventing employees, contractors, or agents from disclosing information to the government or attempting to stop violations of the false claims statute.[638]

There are also various state laws that protect whistleblowers who report allegations of wrongdoing against vulnerable populations. For example, a Massachusetts law protects health care providers from retaliation who report violations, provide information during an investigation, or refuse to participate in unlawful or unethical acts.[639] The health care workers' whistleblower statute protects health care providers from retaliatory action for disclosing or objecting to an activity, policy, or practice of a health care facility that the provider reasonably believes to be a violation of a law, rule, regulation, policy, or professional standard.[640] For purposes of the statute, a *health care facility* includes individuals, partnerships, associations, corporations, or other persons that employ health care providers, including hospitals, clinics, and nursing homes. The whistleblowing protection will not apply to an individual who files a report with a public body without first informing the individual's employer about the allegedly unlawful policy or practice.[641] The law also requires health care providers to "conspicuously display

[636] MASS. GEN. LAWS ch. 151B, § 3A(b)(1).

[637] MASS. GEN. LAWS ch. 149, § 185.

[638] MASS. GEN. LAWS ch. 12, § 5J.

[639] MASS. GEN. LAWS ch. 149, § 187.

[640] MASS. GEN. LAWS ch. 149, § 187(b)(1).

[641] MASS. GEN. LAWS ch. 149, § 187(c)(1).

notices reasonably designed to inform its health care providers of their protections and obligations" under the law.[642]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[643] and the Railway Labor Act (RLA)[644] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

Under Massachusetts law, during the course of a strike, lockout, or "other labor trouble among his employees," an employer that publicly advertises for employees or otherwise solicits (directly or indirectly) replacement workers must "plainly and explicitly" mention the situation in the advertisement (or oral or written solicitations).[645] Indeed, the notice or advertisement must state that strike, lockout, or other labor trouble exists and must appear in type "as prominent as the largest printed matter in the advertisement or poster."[646] In addition, an employer "wishing to hire replacements through an employment agency must first notify the agency by registered mail of the fact that a strike, lockout or other labor trouble exists."[647]

Unemployment benefits are not available "if the unemployment is due to a stoppage of work which exists because of a labor dispute."[648] If, however, there is no "stoppage of work" within the meaning of the statute, then the employees are entitled to unemployment benefits for the duration of the strike. Here, it is important to know that for purposes of eligibility, a *work stoppage* is not necessarily

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642 MASS. GEN. LAWS ch. 149, § 187(h).

643 29 U.S.C. §§ 151 to 169.

644 45 U.S.C. §§ 151 *et seq*.

645 MASS. GEN. LAWS ch. 149, § 22.

646 MASS. GEN. LAWS ch. 149, § 22.

647 MASS. GEN. LAWS ch. 149, § 22.

648 MASS. GEN. LAWS ch. 151A, § 25.

synonymous with *strike*. In order for the *work stoppage* to be disqualifying, the employer's operations must be "substantially curtailed." Of course, the determination as to whether operations are "substantially curtailed" involves a fact-intensive inquiry.[649]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[650] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[651] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

Massachusetts does not have a conventional mini-WARN statute that requires notice to employees. The Massachusetts plant closing law provides standards of corporate conduct in the event of a plant closing.[652] According to the statute, employers financed, insured, or subsidized by a quasi-public agency of the Commonwealth must accept the statutory standards. For all other employers, advance notification of plant closings to affected employees is voluntary.

Covered employers are expected to make a "good faith effort" to provide affected employees with the maximum practicable combination of: "the longest possible advance notice" where notice is possible and appropriate; and maintenance of income and health insurance benefits. While no minimum standard is provided, covered employers are expected to provide at least 90 days' notice or equivalent notice when possible. Such notice may be given in writing to employees or to their collective bargaining agent.[653]

Significantly, because the funds for the Reemployment Assistance Program are subject to appropriation, and because the Program has not been funded, the notice requirement is not currently enforced.

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[649] *Hertz Corp. v. Acting Director of the Div. of Emp't & Training*, 771 N.E.2d 153 (Mass. 2002).

[650] 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[651] 20 C.F.R. §§ 639.4, 639.6.

[652] MASS. GEN. LAWS ch. 149, §182.

[653] MASS. GEN. LAWS ch. 151A, § 71A.

4.1(c) *State Mass Layoff Notification Requirements*

Under Massachusetts unemployment insurance law, employers closing a facility must promptly report to the Commissioner of Labor and Workforce Development information (as required by regulation) to help determine the employees' right to reemployment assistance benefits. The commissioner will certify that a plant closing has or will occur if the commissioner determines that at least 90% of the employees of a facility have been or will be permanently separated within the six-month period prior to the date of certification (or other period prescribed by the commissioner).[654]

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 10 lists the documents that must be provided when employment ends under federal law.

Table 10. Federal Documents to Provide at End of Employment

Category	Notes
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[655] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[656]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 11 lists the documents that must be provided when employment ends under state law.

Table 11. State Documents to Provide at End of Employment

Category	Notes

[654] MASS. GEN. LAWS ch. 151A, § 71B.

[655] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[656] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	Small group carriers covered by the mini-COBRA provisions must provide qualified beneficiaries with notices of their right to continue coverage. Notice must be provided within 14 days of the date that the carrier becomes aware that a qualifying event (*i.e.*, termination) has occurred that affects employee or beneficiary coverage. The small group carrier may require a small employer or intermediary to issue the necessary notices to qualified beneficiaries, if certain criteria are met, including notice to the employer of this obligation and additional information necessary for the disclosure.[657]
Unemployment Compensation	**Generally.** Employers must issue to every separated employee, as soon as practicable, but no later than 30 days from the last day the employee performed compensable work, written information about unemployment benefits on a form approved by the state unemployment division. This notice must contain: • employer's name and mailing address; • the employer's assigned unemployment identification number; • instructions on how to file a claim for unemployment compensation; • address and telephone number of the regional unemployment office which serves the separated employee; and • telephone number of the teleclaim information line. Delivery is made when an employer provides this information to an employee in person or by mail to the employee's last known address. Employers have the burden of demonstrating they complied with the notice requirements.[658] **Multistate Workers.** Massachusetts does not require that employees be again notified as to the jurisdiction under whose unemployment compensation law services have been covered.[659] It is recommended, however, that employers consider providing notice of the jurisdiction where services will be covered for unemployment purposes. Employers

[657] MASS. GEN. LAWS ch. 176J, § 9; *see* Massachusetts Office of Consumer Affairs & Bus. Reg., *MiniCobra Continuation of Coverage Benefits Guide*, *available at* http://www.mass.gov/ocabr/insurance/health-insurance/consumer-guides/minicobra.html; *see also* Massachusetts Office of Consumer Affairs & Bus. Reg., *Bulletin 1997-05, Small Group Continuation of Coverage Law* (May 22, 1997), *available at* https://www.mass.gov/doc/1997-05-the-small-group-continuation-of-coverage-law/download.

[658] MASS. GEN. LAWS ch. 151A, § 62A; 430 MASS. CODE REGS. 5.02. The written information, Form 0590A (*How to Apply for Unemployment Insurance Benefits*), is available online in English, Spanish, Portuguese, Haitian (Creole), Chinese, Vietnamese, Russian, Italian, Lao, Khmer, Arabic, Korean, and French. Massachusetts Exec. Office of Labor & Workforce Dev., *Workplace Posters and Brochures*, *available at* http://www.mass.gov/lwd/unemployment-insur/forms-and-publications/workplace-posters/.

[659] *See* MASS. GEN. LAWS ch. 151A, § 66; *see also* 430 Mass CODE REGS. 4.05.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
	should also follow that state's general notice requirement, if applicable.

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

In Massachusetts, there are no statutory guidelines about providing employer references or prohibiting blacklisting of employees. However, an employee may sue a former employer in tort for providing a negative reference that interferes with their ability to gain subsequent employment. That said, an employer's communications concerning a former employee may be conditionally privileged if true and therefore not actionable.[660]

An employer can lose the conditional privilege and be found liable for defamation if the employer discloses defamatory information about an employee in a reckless manner or with actual malice.[661] When considering whether a conditional privilege exists, the truth or falsity of the allegedly defamatory remark is immaterial; the privilege is extinguished only if the plaintiff proves that, in making the statement, the defendant acted recklessly or for reasons unrelated to the corporate interest.[662] A statement may also lose its conditional privilege if it is published or communicated to individuals who do not share a common interest with the employer.[663]

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[660] *See, e.g.*, *Conway v. Smerling*, 635 N.E.2d 268, 273 (Mass. App. Ct. 1994) (disclosure of police investigation concerning plaintiff to potential employer did not support tortious interference claim because such statements were conditionally privileged; court noted "[i]n response to an inquiry about a former employee, [the employer] had a privilege, if not a duty, to speak the truth even if the disclosure of the facts might negatively affect the subject's job prospects") (citations omitted); *see also Sheehan v. Tobin*, 93 N.E.2d 524, 528 (Mass. 1950) ("This defense of conditional or qualified privilege is applied usually in cases where information is sought from an employer as to the qualifications or character of a former employee. Statements made to one contemplating the employment of the person inquired about, in the absence of abuse of the privilege, are protected"); *Dexter's Hearthside Rest., Inc. v. Whitehall Co.*, 508 N.E.2d 113, 116 (Mass. App. Ct. 1987) ("an employer has a conditional privilege to disclose information which may turn out not to be true concerning an employee when the publication is reasonably necessary to serve the employer's legitimate interest in the fitness of the employee to perform their job, *e.g.*, letters of reference or evaluation"); *Miller v. Tope*, 2003 WL 22794487, at *9 (D. Mass. Nov. 24, 2003) ("courts have made clear that [ ] a conditional privilege applies . . . where an employer makes a defamatory statement about a former employee in providing a recommendation, at the former employee's request, to a prospective employer").

[661] *See Bratt v. I.B.M. Corp.*, 467 N.E.2d 126 (Mass. 1984).

[662] *Dexter's Hearthside Rest., Inc.*, 508 N.E.2d at 117; *see also Dear v. Devaney*, 938 N.E.2d 240, 247 (Mass. App. Ct. 2013) (holding evidence of insufficient and incomplete investigation prior to defamatory report sufficient to destroy conditional privilege for summary judgment purposes); *Ezekiel v. Jones Motor Co. Inc.*, 372 N.E.2d 1281, 1287 (Mass. 1978) (malice requires evidence of "'an improper motive,' or an intent to abuse the occasion by resorting to it 'as a pretense,' or 'reckless disregard' of the rights of another") (internal citations omitted).

[663] *See Draghetti v. Chmielewski*, 626 N.E.2d 862, 868-69 (Mass. 1994).