Massachusetts Wage & Hour Laws

What Every Manager Needs to Know

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Introduction

Much has been written about, and many training programs have focused on, equal employment law issues in the workplace, such as sexual harassment and race discrimination. In recent years, courts have issued many decisions clarifying an employer's legal duties in these areas. Consequently, the potential for successful lawsuits has decreased.

An employer's duties under wage and hour laws, and in properly determining whether a worker is an employee or an independent contractor, have been much less publicized in the recent past. Yet cases have arisen, including a significant Microsoft decision, where employees (mis)classified as independent contractors have successfully sued their employers and were awarded damages, such as stock options they would have been issued if classified as employees all along. As employees and the attorneys who represent them search for easier targets, wage and hour laws are becoming more of a breeding ground for lawsuits. The American Bar Association recently reported a "marked increase" in such suits. Employers should expect this trend to continue. They should know their duties under these laws to avoid potentially devastating lawsuits.

This guide is intended to provide Massachusetts employers with information about the basic requirements of federal and state wage and hour laws, as well as employer responsibilities regarding the proper classification of workers. It is a primer and a quick reference guide, not a comprehensive or exhaustive description of all the laws with which Massachusetts employers must comply.

I. Federal Fair Labor Standards Act and Massachusetts Wage and Hour Laws

The Fair Labor Standards Act ("FLSA") is the federal minimum wage and overtime law. It applies to employers handling goods that have moved in "commerce" and have an annual dollar volume of at least $500,000. The FLSA also contains child labor restrictions and employee time record requirements. Massachusetts has its own overtime statute, which is virtually identical to the FLSA in most respects.

It is important that employers follow these wage laws because of the potential for large back pay awards. There may also be penalties for certain violations. Under the state law, for example, any employer or the officer or agent of any corporation who pays or agrees to pay any employee less than the required overtime rate of compensation "shall be punished by a fine of not more than $25,000 or by imprisonment of not more than one year" for a first offense, if it is willful. Even absent willful intent, punishment shall be "a fine of not more than $10,000 or by imprisonment for not more than six months for a first offense." An employee can also bring a civil lawsuit if paid less than the required overtime rate of compensation by an employer and recover three times the full amount of such overtime compensation, along with costs and attorneys' fees.

The federal Department of Labor enforces the FLSA and has a full-time legal staff to prosecute claims. In Massachusetts, the Office of the Attorney General is the agency responsible for enforcing the state wage and overtime laws.

The key elements and concepts of these laws are discussed in the following text.

The Workweek

The basic unit of measurement for wage/hour laws is the week, more particularly the "workweek." An employee's workweek is a fixed and regularly recurring period of seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. Different employees can have different workweeks; there need not be a standard workweek among employees for the same employer or the same establishment. Once the beginning time of an employee's workweek is established, it generally remains fixed regardless of the schedule of hours worked by the employee. The workweek may be changed only if the change is intended to be permanent and is not designed to evade the overtime laws.

Day of Rest

Massachusetts requires manufacturers, mechanical establishments, and mercantile establishments to provide their employees with 24 consecutive hours of rest every seven consecutive days. Massachusetts does have certain exceptions, and employers may seek a waiver from the Office of the Attorney General.

Minimum Wage

As of January 1, 2007, the federal minimum wage is set at $5.15 per hour, while Massachusetts requires employers to pay a minimum wage of $7.50 per hour. The Massachusetts minimum wage will rise to $8.00 on January 1, 2008. While having no effect at this time, the state law also provides that the minimum wage in Massachusetts will at all times be at least $0.10 (ten cents) higher than the federal minimum rate. Employers may determine the amount of wages, if any, to be paid above the statutory minimum.

Overtime

Employers are prohibited from working any non-exempt employee more than 40 hours in a workweek without paying the employee extra compensation for the overtime hours worked. The required overtime premium rate is one-and-one-half times the employee's "regular rate" of compensation. There is no absolute limitation on the number of hours an employee may work in a workweek (with the exception of child laborers). As long as the required overtime compensation is paid, an employee may be required to work as many hours a week as the employer sees fit to assign. [Note, however, that Massachusetts does require "one day of rest" in each workweek.] In Massachusetts, an employee need not be paid overtime for hours worked in excess of eight hours in a given day or for work on Saturdays, Sundays, holidays, or regular days of rest, except for retail establishments, which have special rules for Sundays and certain holidays. [Note that other states, such as California, require daily overtime pay.] Overtime premium compensation for "time and one-half" need only be paid for hours worked in excess of 40 in a given workweek. Moreover, the law does not require that an employee's use of sick, vacation, or holiday time during a workweek be counted toward the 40 hours. The employee must actually work for 40 hours to qualify for overtime pay; being paid for time not worked does not qualify.

Retail stores cannot force employees to work on New Year's Day, Memorial Day, the Fourth of July, Labor Day, Columbus Day, or Veterans Day. Employees who choose to work on one of these holidays must be paid time and one-half. Likewise, retail stores cannot require employees to work on Sundays. However, retailers who employ seven or more employees on any day of the week must pay wages of time and one-half to non-exempt employees who work on Sundays.

Regular Rate

The FLSA requires employers to compensate non-exempt employees for hours worked in a week in excess of 40 at a rate not less than one and one-half times the "regular rate." An employee's "regular rate" of pay is not determined by a declaration of one or both parties as to what is to be treated as the employee's regular rate; it is a legal determination to be drawn from what actually happens in the employment relationship. Nor is it necessarily the base hourly rate an employee is on the books for. Instead, the regular rate is based on what is actually paid to the employee. The regular hourly rate of pay of an employee is determined by dividing his total remuneration (except for certain statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek. Under certain circumstances, this can include bonuses, commissions, and other kinds of payments to employees.

Some non-exempt employees are paid a weekly salary rather than an hourly rate; for them the calculation of the statutory "regular rate" depends on the number of hours that the salary is intended to compensate. If an employee generally works 40 hours each week with occasional overtime, the employer can merely divide the weekly salary by 40 to figure out the regular rate and then pay all overtime at one and one-half times that rate.

Fluctuating Workweek Method of Calculating Overtime

Employers can choose to use a more complex method to determine an employee's regular rate for a non-exempt employee who receives a fixed weekly

salary and who works fluctuating hours from week to week. In these cases it may be appropriate to use the "fluctuating workweek" overtime method to figure out an employee's regular rate. For a fluctuating workweek system to be permissible under the FLSA, there must be a "clear mutual understanding" between an employer and employee that the fixed weekly salary paid to the employee is the employee's salary regardless of how many hours the employee may work in a given week, whether it is more or less than 40 hours. The amount of such salary must be sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest.

Under this method, the regular rate of the employee will vary from week to week, since the salary in a fluctuating workweek situation is intended to compensate the employee at straight-time rates for whatever hours are worked in a regular workweek. The regular rate is determined by dividing the number of hours worked in a particular workweek into the amount of the salary to obtain the applicable hourly rate for that week. Payment for overtime hours at one-half such rate, in addition to the salary, satisfies the overtime pay requirement because such hours have already been compensated at the straight-time regular rate under the salary arrangement.

For example, suppose an employer and employee have agreed that the employee will earn a salary of $500 each week even though the number of hours the employee will work each week will fluctuate. If, during one workweek, the employee works 50 hours, the regular rate for that week will be $10 per hour ($500/50). In addition to the $500 salary, the employee must be paid an additional $50 in overtime wages, which is one-half his regular hourly rate for each hour (10) that he worked over 40. By contrast, without the fluctuating workweek method, the employer would owe the employee $187.50 in overtime pay for that week rather than $50 ($500/40 x 1.5 x 10). If the employee works 42 hours the next week, a new calculation to figure out that week's regular rate must be made. Keep in mind, however, that under this system, if the employee only works 36 hours in a given workweek, he still must be paid his agreed-upon $500 salary for that week.

Working Time

Employees must be compensated for all "working time." Working time generally includes all time during which an employee is required to be on the employer's premises, on duty, or at the prescribed workplace, in addition to any time during which an employee is "suffered" or "permitted" to work, whether or not the employee is required to do so. Thus, even if an employee voluntarily continues working at the end of a shift, the employer must count it as working time if it knows or has reason to believe that the employee is continuing to work. Working time is not limited to the hours spent in active, productive labor, but includes time given by the employee to the employer even though spent in idleness. The U.S. Supreme Court recently determined time spent "donning and doffing" unique protective clothing would also constitute working time. However, working time does not include meal times during which the employee is relieved of all work-related duties, and the break is at least 30 minutes. An employee is not relieved if he is required to perform any duties, either active or inactive, while eating, such as an office employee being required to eat at his desk. Midshift breaks of 20 minutes or less, such as coffee breaks or smoke breaks, must be paid.

On-Call Time

If an employer requires an employee to be on call at or very near the work site to attend to emergencies, the employee must be paid as if he were doing any other work for the company. If an employee is not required to remain on or near the employer's premises, but is merely required to leave word where he may be reached, he is not working and need not be paid (unless, of course, he is called into work).

Training Programs

Training programs sponsored by the employer need not be counted as working time if the following criteria are met:

1. Attendance is outside of the employee's regular working hours.
2. Attendance is voluntary.
3. The course, lecture, or meeting is not directly related to the employee's job.
4. The employee does not perform productive work during such attendance.

Training is considered directly related to the employee's job if it is designed to make the employee handle his job more effectively, as distinguished from training the employee for another job or providing a new or additional skill. Where a training course is instituted for the bona fide purpose of preparing the employee for advancement through upgrading her to a higher skill and is not intended to make the employee more efficient in her present job, the training will not be considered working time even if it incidentally improves the employee's skill in doing her regular work.

Reporting Pay

Employees who report for scheduled work but for whom no work is available that day must be given at least three hours pay at the Massachusetts minimum wage rate.

Travel Time and Expenses

An employee who is required to travel from one place to another during the workday must be compensated for all time spent traveling at the same rate as for working time and must be reimbursed for all transportation expenses. If, for the employer's convenience, an employee is required to report to a location other than her regular work site, the beginning of the work day is construed to include only the additional time it would take for the employee to travel from the regular work site to the alternate work site and return, and expenses will be reimbursed for any additional transportation needed.

Exempt vs. Non-Exempt Employees

Certain employees are deemed "exempt" from the overtime and minimum wage provisions of state and federal wage laws. In addition to specific occupations and industries that fall within the exemptions, there are general exclusions for bona fide "executive," "administrative," or "professional" employees and for persons employed in the capacity of "outside salesman." It is important that classifications are made properly because the consequences for misclassifying employees are potentially expensive. The FLSA sets forth specific tests for determining whether an employee qualifies for an exemption under the law, in which case the employee need not be paid overtime premiums. Job titles alone are not determinative.

FLSA'S New Regulations

"White Collar" Employees — Generally

There are three general white collar categories that are exempt from the FLSA's minimum wage and overtime pay requirements: "executive," "administrative," and "professional" employees. There are also exemptions for certain "computer" employees and "outside sales" employees. The U.S.

Department of Labor issued new regulations, which took effect in 2004, for determining who can be classified as an exempt white collar employee. Massachusetts follows the Department of Labor's tests, so these revisions apply under Massachusetts law as well. Under the new regulations, an employee who is paid a guaranteed salary of not less than $455 per week can be classified as exempt if the employee meets the "duties" tests for an executive or administrative or professional employee as described below.

Executive Employees

To be classified as an exempt executive employee, in addition to a guaranteed salary of not less than $455 per week, a person must satisfy each of the following tests:

1. Employee's primary duty is the management of the enterprise or a recognized department or subdivision.
2. Employee customarily and regularly directs the work of two or more other employees.
3. Employee has authority to hire or fire other employees (or the recommendations as to hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight).

A "business owner" can also be classified as an exempt executive. A business owner is any employee who 1) owns at least a 20 percent equity interest in the enterprise in which the employee is employed and 2) is actively engaged in its management. It is not necessary to pay a business owner a guaranteed weekly salary in order to classify that person as an exempt executive.

The term "primary duty" means the principal, main, major, or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider include the relative importance of the exempt duties compared to other types of duties, the amount of time spent performing exempt work, and the relative freedom from direct supervision. It is not necessary that an employee spend more than 50 percent of his time performing exempt work.

When an enterprise has more than one establishment, the employee in charge of each establishment may be considered to be in charge of a recognized subdivision of the enterprise. Certain supervisors in retail establishments can also be classified as exempt executives even if they perform non-exempt work. For example, an assistant manager whose primary duty includes such activities as directing employees' work, handling employee complaints and grievances, or performing other management functions may be an exempt executive. An assistant manager can supervise employees and serve customers at the same time without losing the exemption.

Administrative Employees

To be classified as an exempt administrative employee, in addition to a guaranteed salary of not less than $455 per week, a person must satisfy each of the following tests:

1. Employee's primary duty is performing office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers.
2. Employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making

a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes, or resolving grievances. The term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review.

Professional Employees

There are two types of exempt professional employees: "learned professionals" and "creative professionals." The duties to qualify for exemption, in addition to a guaranteed salary of not less than $455 per week, are:

A. Learned Professionals

Employee's primary duty is performing work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. "Work requiring advanced knowledge" means work that is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment. Examples of learned professionals include lawyers, doctors, teachers, accountants, engineers, architects, registered nurses, dental hygienists, and others. [Note: The guaranteed salary requirement does not apply to teaching professionals, licensed lawyers, and licensed medical professionals.]

B. Creative Professionals

Employee's primary duty is performing work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Examples of creative professionals include actors, musicians, composers, conductors, and soloists. Certain painters, cartoonists, journalists, and writers may also qualify as creative professionals.

Highly-Compensated Employees

An employee with a total annual compensation of at least $100,000 qualifies for exemption if he customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. The employee's primary duty must include performing office or nonmanual work. "Total annual compensation" must include at least $455 per week paid on a salary or fee basis.

Computer Employees

An employee who is paid a guaranteed salary of not less than $455 per week or not less than $27.63 per hour can be classified as exempt if she is employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field and has the following duties: (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional applications; (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (C) design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or (D) a combination of duties described in (A), (B), and (C), the performance of which requires the same level of skills.

Outside Sales Employees

There is no required salary or hourly wage that must be paid to a person in order to qualify for exemption as an outside sales employee. The required duties for this classification are:

1. Employee's primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.
2. Employee is customarily and regularly engaged away from the employer's place or places of business.

Paying Exempt Employees on a Salary Basis

As explained above, for a white collar employee to qualify for an exemption from the minimum wageand overtime pay obligations of the FLSA, as an executive, administrative, or professional employee or as a salaried computer employee, the employee must be paid on a "salary basis." This is a phrase that is carefully defined by Department of Labor regulations. The regulations require an employer to pay regularly to a person who is classified as an exempt "salaried" employee a predetermined amount of pay each pay period, "which amount is not subject to reduction because of variations in the quality or quantity of work performed." Subject to certain specifically defined exceptions, the employee must receive his or her full salary for any week in which the employee performs any work, without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

There are three types of deductions that an employer can make from an employee's full weekly salary that will not result in loss of exempt status. First, deductions may be made when an employee is absent from work for a full day or days for personal reasons other than sickness or disability. Second, deductions may be made for absences of a full day or more occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by such sickness or disability. Third, penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. While the regulations do not permit deductions for absences to perform jury duty or for attendance as a witness at a trial or for temporary military leave, an employer may offset any amounts an employee receives for these activities against the salary that would otherwise be due for a particular workweek.

The Department of Labor's revised regulations permit deductions from the pay of exempt employees for unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees.

An employer who makes improper deductions from the salary of an otherwise exempt employee will lose the exemption if the facts demonstrate that the employer did not intend to pay an employee on a salary basis. Any actual practice of making improper deductions demonstrates that the employer did not intend to pay an employee on a salary basis. Improper deductions that are isolated or inadvertent will not result in loss of the exemption if the employer reimburses the employees for such improper deductions. A clearly communicated policy prohibiting improper pay deductions that includes a complaint mechanism, reimburses employees for improper pay deductions, and makes a good-faith commitment to comply in the future, will prevent loss of the exemption unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

One of the ways employers frequently lose the exemption is by making deductions from an employee's salary for absences of less than a whole day, for example, when an exempt employee takes the afternoon off to play golf or an employee is delayed in getting to work by the weather or car trouble. The government and the courts have been adamant in holding that such deductions mean an employee is not being paid on a salary basis.

The problem of hourly and other partial-day deductions was raised with the passage of the Family and Medical Leave Act, which permits unpaid leave for certain employees. The law permits an employer to make deductions from an employee's salary for any hours taken as FMLA leave during a workweek without affecting the exempt status of the employee. Other leave laws, including the state Small Necessities Leave Act, are not similarly treated and thus do not justify deductions for partial-day absences.

Many employers have "leave banks," which include time such as sick, vacation, and personal, that employees can use in increments of less than a day to cover certain absences. Opinions of the Wage and Hour Administrator have stated that deductions from an employee's leave bank for partial-day absences do not destroy the employee's salaried status as long as the employee receives his or her full salary for each workweek. Employers, however, must continue to pay exempt employees their guaranteed weekly salary when they exceed the time they have accrued in their leave banks for a personal absence of less than a day. There are some deductions and pay practices that will undoubtedly result in the loss of exempt status and should be avoided. These include:

1. Employing an otherwise exempt employee at an hourly rate (except for persons in certain computer-related occupations as described above).
2. Making deductions from an exempt employee's predetermined salary because of variations in either the quality or quantity of that person's work.
3. Making deductions for absences that are required by the employer on the basis of the operating requirements of the business, including lack of work.
4. Making deductions for a partial day's absence from work, no matter the reason an employee is absent.

5. Making deductions for a whole day of work because of illness or disability and the employer does not have a bona fide plan, policy, or practice of providing compensation for this reason.

Note that the regulation does permit deductions from salary both before an employee qualifies under such a plan and after she has exhausted the allowed leave under the plan.

6. Making deductions for jury duty or military leave that exceed the amount an employee received for such service.

Commissions and Bonuses

The Department of Labor's regulations expressly permit the payment of additional compensation to exempt employees that is over and above the "predetermined amount constituting all or part of an employee's compensation." Thus payment of bonuses, commissions, or other types of additional compensation will not mean an employee is not being paid on a "salary basis" and will not remove an employee from exempt status under the FLSA.

Record Keeping and Enforcement

Employers are required to maintain sufficient records regarding employee wages and hours such that enforcement authorities can verify compliance with wage and overtime requirements. This should include the name, address, Social Security number, and occupation of each employee, together with the amount paid each pay period to each employee. For non-exempt employees, the employer must keep an accurate record of the hours worked each day and each week by each employee. An employer should keep these records on file for at least three years after the date of the records. Random audits of records are conducted by the Department of Labor, the Director of the Massachusetts Department of Labor and Workforce Development, and the Massachusetts Attorney General's Office to evaluate whether businesses are following these laws.

II. Wage Payment Processes

General

In addition to laws governing how much employees must be paid, Massachusetts law also governs the timing of wage payments. Employers must pay hourly employees either weekly or bi-weekly. Salaried employees can be paid weekly; biweekly; semimonthly; or, at an employee's own option, monthly. Payment must be made to an employee within six days of the pay period during which the wages were earned if the employee is employed for five or six days in a calendar week, or within seven days if the employee is employed for seven days in a calendar week. The rule is different for so-called casual employees who have worked for a period of fewer than five days; for them, wages must be paid within seven days after the termination of such period.

When paying an employee, an employer must furnish a pay slip, check stub or envelope showing the name of the employer; the name of the employee; the day; month and year; the number of hours worked; the hourly rate; and the amounts of deductions or increases made for the particular pay period.

Employees who are fired from work must be paid all wages owed on the day of discharge. Employees who quit, retire, or leave employment for other reasons must be paid in full on their next regular payday.

Commissions must also be paid when the amount of such commissions has been definitely determined and has become due and payable under the company's plan.

Employers generally are not free to withhold from the final paycheck of a former employee amounts they believe are owed to them by the employee. Only where there is a definite amount of money at issue and there can be no dispute that the money is owed, can the employer "set off" that amount from the employee's final paycheck.

Vacation Policies

Employers who choose to provide paid vacation to their employees must treat those payments like any other wages under Massachusetts law. While an employer is not obliged to provide paid vacation time to its employees, once it decides to do so, the law will treat the paid vacation time as if it were wages, using the same principles discussed above concerning the time for payment. While an employer is free to amend its vacation policies at any time, any amendments may apply prospectively only. The area where problems most frequently arise is in the termination context. The law states that accrued holiday or vacation pay that is owed to an employee must be paid upon termination of employment. Withholding vacation or holiday payments is the equivalent of withholding wages and, as such, is illegal. An employer may not enter into an agreement with an employee under which the employee forfeits earned vacation payments, although the Attorney General has allowed so-called "use it or lose it" policies, as described below.

An employer may establish the amount of paid vacation an employee will receive, as well as a specific time of the year when the employee can take a vacation, depending on the needs or demands of the business. Employers may also establish procedures regarding the scheduling of vacations (e.g., notification to the employer of the intent to take a vacation and for how long). An employer may also cap the amount of vacation time that an employee may accrue or earn, by stating prospectively that after accruing a certain number of days, the employee will not earn additional time until using some of the accumulated vacation time. Unless an employee separates from employment or agrees to receive monetary compensation in lieu of vacation time, time earned under any vacation policy need be compensated only with the equivalent time off.

A variation on capping accrued vacation time is the type of policy known as use-it-or-lose-it. Under such a policy, an employee must use all of his accrued vacation time by a certain period of time or lose all or part of it. In order to institute a "use it or lose it" policy, the employer must provide adequate prior notice of the policy to employees and must ensure that employees have a reasonable opportunity to use the accumulated vacation time within the time limits established by the employer.

An employer should unambiguously state how an employee is going to earn vacation time. This includes stating when an employee is eligible to begin earning time and the rate at which it will be earned (e.g., one day per month). If a policy merely provides for employees to receive a given amount of vacation time "per year" or "on their anniversary dates," such period is imprecise and may lead to disputes.

Some employers provide time off to employees in one general leave category, sometimes called "paid time off" (PTO), which combines sick leave, personal leave, vacation leave, and/or other types of leave. Employers who provide leave time in this manner should designate the number of hours or days of the leave that are considered vacation time, which can be used as proof that not all such leave time is to be considered "wages" under the law.

Meal and Rest Breaks

Massachusetts law mandates that employees who work more than six hours in a day must be given a break of at least 30 minutes for a meal, which can be either paid or unpaid. If the time is to be unpaid, the employee must be completely relieved from duty for the purposes of eating the meal. Employers can at their option allow employees to take other breaks during the workday, and such breaks generally must be paid.

Liability

Penalties for violating the Massachusetts wage payment statute can be severe. Employers can be tried both civilly and criminally. The law allows the Attorney General to file a complaint against any person for violating the statute. Also, an employee can institute a civil suit on her own behalf, which can lead to triple damages for any loss of wages. An employee who prevails in such a suit would also be entitled to costs and Attorneys' fees under the law.

An officer, agent, or employee of a company can be held liable individually for violating the wage payment statute. For willful violations of the statute, the first offense "shall be" punished by a fine of up to $25,000 or up to one year's imprisonment or both. Subsequent willful offenses can cause fines of up to $50,000 or up to two year's imprisonment or both. Even absent willful intent, punishment for a first offense "shall be" a fine of up to $10,000 or imprisonment of up to six months or both. A subsequent offense lacking intent shall cause a fine of not more than $25,000 or imprisonment of up to one year or both.

III. Independent Contractors vs. Employees

Employers cannot avoid wage and hour laws simply by classifying employees as independent contractors. The question of whether a person is an "employee" is determined on a case-by-case basis. The key issue, generally stated, is the employer's right to direct and control the individual's work. In some circumstances, people performing work for a company may in fact be independent contractors, such as a plumber or electrician brought in for a specific project. However in many cases, people who are hired to do work for a company will be considered employees and will be subject to the laws covering employment.

Employers must take great care before classifying a worker as an independent contractor rather than an employee, as there can be serious consequences under tax law, employment law, and benefits law if employees are incorrectly classified. If an individual is an independent contractor, the employer is not obligated to withhold income and payroll taxes and issue a W-2 form. Instead it will issue a Form-1099 reporting any payments made to the IRS. An independent contractor is responsible for obtaining his own insurance coverage. A common mistake employers make is to assume that if they call a person an independent contractor, the Internal Revenue Service and state agencies will accept that characterization. In fact, labels are not determinative.

Under Massachusetts law as well, there are serious consequences to misclassifying employees. It is illegal to categorize improperly a person as an independent contractor rather than as an employee in order to avoid the costs of benefits and employee payroll taxes. Employees may not be denied workers' compensation, unemployment insurance, social

security, and other employee benefits simply by labeling them as independent contractors.

One major difference between the two categories is that employers have control not only over what employees do, but the manner in which it is done. On the other hand, employers have less control over the ways in which an independent contractor fulfills his contract obligations. To determine whether an individual is an employee or an independent contractor, the IRS uses a detailed 20-factor test, and many courts and agencies utilize similar tests to make such determinations. The more factors met in this test, the greater the likelihood that the person can be classified as an independent contractor. Unfortunately, there is no magic formula that clearly defines for employers where the line is drawn.

The following are the principal factors to consider concerning independent contractor status:

1. *Degree of Control:* Does the employer have the right to control the method or manner of the job to be performed (if yes, suggests employee).
2. *Right to Discharge:* Can the employer terminate the worker even if he meets his obligations (if yes, suggests employee).
3. *Right to Delegate Work:* Can the worker bring in whomever she wants to accomplish the contract (if no, suggests employee).
4. *Hiring Practices:* Does the worker have the right to hire and fire assistants that he uses in performing the contract (if no, suggests employee).
5. *Pay Practices:* Is the worker paid by the job as opposed to by the hour, week, or other calendar interval (if no, suggests employee).
6. *Training:* Does the employer provide any type of training other than orientation to the job (if yes, suggests employee).
7. *Skill:* Is the worker viewed as a skilled worker (if no, suggests employee).
8. *Duration of Relationship:* Is the worker hired for a specific time period (if no, suggests employee).
9. *Control Over Hours of Work:* Is the worker allowed to set his or her own hours (if no, suggests employee).
10. *Independent Trade:* Is the worker free to work for any number of persons or firms simultaneously (if no, suggests employee).
11. *Furnishing of Tools:* Can or must the worker provide his own tools (if no, suggests employee).
12. *Place of Work:* Does the worker perform her job off the employer's premises (if no, suggests employee).
13. *Profit and Loss:* Does the worker have the opportunity for profit or loss (if no, suggests employee).
14. *Intent of the Parties:* Is the parties' intent to create an independent contractor relationship documented, i.e., by a contract (if no, suggests employee).
15. *Principal in Business:* Is the worker a principal in his or her own business (if no, suggests employee).
16. *Sequence of Work:* Can the worker determine the sequence of the work performed outside the employer's control (if no, suggests employee).

17. *Reports Required:* Is the worker required to submit regular oral or written reports or to attend organization meetings (if yes, suggests employee).

18. *Same Work as Regular Employees:* Does the employer have the worker perform the same type of work as its regular employees (if yes, suggests employee).

19. *Integration:* Does the employer engage the worker to do something that is part of the daily company operations (if yes, suggests employee).

20. *Industry Customs:* Does the employer's industry have a definite custom of independent contractor classification (if no, suggests employee).

In contrast to the above-described IRS test, the FLSA test is different. It has only six factors:

1. The degree of the alleged employer's right to control the manner in which the work is to be performed (more control suggests employment).
2. The alleged employee's opportunity for profit or loss depending upon his managerial skill (if none, suggests employment).
3. The alleged employee's investment in equipment or materials required for his task or his employment of helpers (if none, suggests employment).
4. Whether the service rendered requires a special skill (if no, suggests employment).
5. The degree of permanence of the working relationship (more permanence suggests employment).
6. Whether the service rendered is an integral part of the alleged employer's business (if yes, suggests employment).

In 2004, Massachusetts amended its laws to make it very difficult to achieve independent contractor status. Under the law, there is a rebuttable presumption that any person performing services for another is an employee. This means that workers are considered employees unless proven otherwise. The employer can overcome this presumption if the worker meets the three-prong test set out in the Massachusetts statute:

1. Such an individual has been and will continue to be free from control and direction in connection with the performance of such service under his contract.
2. Such service is performed outside the usual course of business.
3. Such individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

The Attorney General will prosecute an employer who misclassifies an employee as an independent contractor when the facts clearly show the worker to be an employee. In addition, as is the case under the wage payment statute, an officer, agent, or employee of a company can be held individually liable for violating the statute that deals with misclassifying employees. For willful violation of the statute, the first offense "shall be" punished by a fine of up to $25,000 or up to one year's imprisonment or both. Subsequent willful offenses can cause fines of up to $50,000 or up to two year's imprisonment or both. Even absent willful intent, punishment for a first offense "shall be" a fine of up to $10,000 or imprisonment of up to six months or both. A subsequent offense lacking intent shall cause a fine of

not more than $25,000 or imprisonment of up to one year or both.

In recent years, both federal and state agencies have become increasingly aggressive in scrutinizing distinctions between employees and independent contractors. Failure to comply with the Massachusetts law is a criminal misdemeanor, with possible fines up to $1,000 and potential imprisonment for up to two months. Employers are subject to additional liability if a wrongly categorized person, lacking workers' compensation or company medical insurance, is injured on the job.

IV. Temporary Agencies and the "Joint Employer" Doctrine

The "joint employer" doctrine arises when the government attempts to enforce the wage laws against both a temporary help agency and its client. The Department of Labor's Wage-Hour Division has issued regulations regarding joint employment relationships under the FLSA, which provide that a joint employment relationship may exist where (1) there is an arrangement between the employers to share the employee's services; (2) one employer is acting in the interest of another employer in relation to the employee; or (3) the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee. The Wage-Hour Division has issued opinion letters concluding that in certain circumstances "employees of a temporary help agency working on assignment in various business establishments are joint employees of both the agency and the business establishment in which they are employed." If a joint employment relationship is found, both employers can be held jointly and severally liable for compliance with the wage and hour laws. Of course, an assumption implicit in such a finding is that the worker is in fact an employee, rather than an independent contractor, with respect to both employers.

V. Equal Pay Act

The federal Equal Pay Act prohibits employers from discriminating against employees on the basis of sex, in particular by paying employees of one sex at a wage rate less than that paid to employees of the opposite sex in the same establishment for equal work. This is measured by whether the jobs being compared require equal skill, equal effort, and equal responsibility and are performed under similar working conditions. Employers can justify differential wages where the differences are based on a merit system, a system that measures earnings by quantity or quality of production, a seniority system, or any factor other than sex. Differences in education, training, and experience can also be considered. To be valid, however, these distinctions must be rationally and systemically applied on an equal basis to members of both sexes. Note that to prove an Equal Pay Act claim, the work being compared need not be identical and the employee does not have to prove discriminatory intent. Even a small difference in pay could support a violation. Likewise, an employer can violate the law when filling a vacancy temporarily if the temporary replacement is not paid the salary of the filled position. If an employer is found in violation of the law, it cannot lower the pay rate of the more highly paid employees to come into compliance. Rather, the employer must increase the pay of the lower-paid employees. An employer found in violation of the Act may be required to pay back wages for two years, or three years for a willful violation, plus the reasonable attorneys' fees of the plaintiff.

Massachusetts also has an equal pay law that includes similar provisions.

VI. Class Actions and Collective Actions

With increasing frequency, wage and hour claims are being brought as class actions or collective actions. In a class or collective action, a small group of lead plaintiffs (denominated as "class representatives") bring an action on behalf of themselves and others "similarly situated." The putative class is sometimes as broad as all those who worked in a particular position or set of positions in all of the employer's locations throughout the Commonwealth or throughout the United States. The class representatives typically claim that the employer engaged in a violation of wage and hour laws that affected a group of employees. Because plaintiffs' lawyers and lead plaintiffs have significant financial incentives to bring wage and hour class actions, most class actions are brought privately. However, class actions alleging violations of federal and state laws can also be brought by the United States Department of Labor or by the Massachusetts Attorney General.

Recent wage and hour class actions tend to focus on two major issues: (1) alleged violations of the federal and state laws concerning the classification of employees (i.e., exempt vs. nonexempt) and (2) allegations that employees have been required to work "off the clock" without pay and/or have missed rest breaks and meal periods. The first line of cases typically challenges the classification of exempt executives, exempt administrators, and exempt professionals. The damages sought are generally the unpaid overtime hours worked by such employees. The second line of cases (sometimes brought along with the misclassification cases) typically attacks an employer's practices with regard to paying employees for all time worked and/or allowing employees to take breaks allegedly promised to them by a company handbook or by a company representative. These cases seek back pay for the allegedly worked, but unpaid, time.

The stakes in a class action are much larger than in an individual action, and the cases often become extended and resource-draining litigations. Although the damages are the same as for individual actions, because of the collective nature of the claims the potential damage awards are much higher. In addition, attorneys' fees awards can be large in class actions. Thus, payroll and personnel practices that appear to be insignificant may be cobbled together to produce a serious class action claim.

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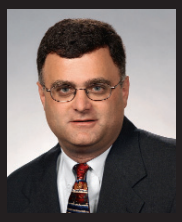
James W. Bucking



James W. Bucking is a Partner in Foley Hoag's Labor and Employment Law Practice. Mr. Bucking advises and represents corporations and other employers in union disputes, wage/hour, discrimination, noncompete, and other labor and employment matters. Mr. Bucking has extensive experience representing management at the bargaining table in union negotiations and litigating labor disputes in court, before arbitrators, and at the National Labor Relations Board. In the field of employment law, Mr. Bucking represents clients in court and before the Massachusetts Commission Against Discrimination defending discrimination complaints. Overtime disputes and payment of wages litigation are an increasingly important part of Mr. Bucking's practice. He successfully represented a biomedical company in a U.S. District Court trial initiated by the federal Department of Labor and has represented many other clients in actions initiated by the D.O.L., the State Attorney General's Office, and private attorneys on various wage/hour issues.

Mr. Bucking is a frequent speaker and author on a variety of labor and employment law topics. He is the former Chair of the Massachusetts Bar Association's Labor & Employment Section and is active in the American Bar Association's Labor and Employment Section. He received his B.S. (summa cum laude) from Northeastern University in 1988 and his J.D. (cum laude, Order of the Coif) from the University of Pennsylvania Law School, where he was an editor of the *Law Review*, in 1991.

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