



## **Wage and Hour Memorandum**

**Prepared by Kurker Paget LLC for the  
Home Care Alliance of Massachusetts**

**February 2015**





# KURKER PAGET

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WAGE AND HOUR SEMINAR  
PRESENTED TO MEMBERS OF THE MASSACHUSETTS HOME CARE  
ALLIANCE

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**Disclaimer: We hope this presentation and guide will help inform employers of the laws that govern the homecare industry, particularly with respect to wage and hour issues. Should employers have questions about anything contained in the presentation or this guide, we encourage you to contact us so we can assess your individual situation. Please note that this information is not intended to create an attorney-client relationship, nor does it constitute legal advice.**

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## **Record-Keeping and Payroll**

### *What types of personnel records must employers maintain?*

There are three applicable laws that require employers to maintain information and records about their employees. Below, please find a summary of each.

#### **Fair Labor Standards Act**

The Fair Labor Standards Act is the federal wage and hour law that governs issues like minimum wage and overtime. It also imposes recordkeeping requirements upon nearly all employers. These recordkeeping requirements include the following:

- Employee's full name and social security number;
- Address, including zip code;
- Birth date, if younger than 19;
- Sex and occupation;
- Time and day of week when employee's workweek begins;
- Hours worked each day;
- Total hours worked each workweek;
- Basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework");
- Regular hourly pay rate;
- Total daily or weekly straight-time earnings;
- Total overtime earnings for the workweek;
- All additions to or deductions from the employee's wages;
- Total wages paid each pay period, and;
- Date of payment and the pay period covered by the payment.<sup>1</sup>

#### **Massachusetts personnel records statute**

Mass. Gen. Laws C. 149, §52C<sup>2</sup> requires employers with 20 or more employees to maintain the following employment records:

- name, address, date of birth, job title and description;
- rate of pay and any other compensation paid to the employee;
- starting date of employment; the job application of the employee;

<sup>1</sup> 29 CFR Part 516; see also, Fact Sheet #79C: Recordkeeping Requirements for Individuals, Families, or Households Who Employ Domestic Service Workers Under the Fair Labor Standards Act (FLSA), <http://www.dol.gov/whd/regs/compliance/whdfs79c.htm>

<sup>2</sup> Massachusetts General Law Chapter 149 § 52C, <http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section52C>

- resumes or other forms of employment inquiry submitted to the employer in response to his advertisement by the employee;
- all employee performance evaluations, including but not limited to, employee evaluation documents; written warnings of substandard performance; lists of probationary periods; waivers signed by the employee; copies of dated termination notices; any other documents relating to disciplinary action regarding the employee.

### **Massachusetts General Laws, C. 151 § 15**

The Massachusetts Wage Act imposes the following recordkeeping requirements of all employers, regardless of size:

- the name, address and occupation of each employee;
- the amount paid each pay period to each employee;
- the hours worked each day and each week by each employee, and
- such other information as the commissioner or the attorney general in their discretion shall deem material and necessary.

#### *What else do Massachusetts employers need to know about the Personnel Records law?*

Employers must notify an employee within 10 days of placing any information in the employee's personnel record that is, has been, or may be used to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation, or possible disciplinary action. Although an employee may only review his/her personnel record twice a year, if there are any of the aforementioned additions to the record, the employee also has the right to inspect the record upon each potentially adverse addition.<sup>3</sup>

In Massachusetts, employees have a statutory right to review their personnel files at their place of employment during normal business hours. Employers must allow employees to review their files within five days of receiving a written request, and employees are entitled to a copy within five days of receipt of their written request. If an employee disagrees with information contained in the file, it is to be corrected if mutually agreed on by employer and employee. If agreement isn't reached, employees may submit written statements explaining their positions.

#### *How often must employees get paid?*

Employees who are nonexempt must be paid every week or every other week.

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<sup>3</sup> Massachusetts General Law Chapter 149 § 52C,  
<http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section52C>

Employers must notify employees in writing of a change in the pay schedule from weekly to biweekly at least 90 days before implementing the change.<sup>4</sup>

*Can I round my employee's time?*

An employer may round an employee's starting and stopping time to the nearest five minutes, one-tenth, or quarter of an hour provided that this manner of computing working time averages out over a reasonable period of time so that an employee is fully compensated for all the time he or she actually worked.<sup>5</sup>

*What record-keeping requirements are required under the federal domestic service regulations?*

In September 2013, the U.S. DOL issued the "Application of the Fair Labor Standards Act to Domestic Service, Final Rule" making clear that certain domestic care workers are protected by the minimum wage and overtime requirements under the FLSA. Although the amendment did not impact Massachusetts employers (since Massachusetts already covered homecare workers under its wage laws), Massachusetts employers are subject to new federal record-keeping requirements for live-in domestic workers.<sup>6</sup> See page 15 for more information.

**Overtime**

*What are the overtime requirements in Massachusetts?*

Employees must be paid "one and one half times" their "regular hourly rate... for work in excess of 40 hours in a work week." The "regular hourly rate" cannot be less than the basic minimum wage, which currently is \$9.00 per hour.<sup>7</sup>

*How do I determine an employee's "regular rate?"*

The "regular rate" is determined by dividing the total hours worked during the week into the employee's total weekly earnings.<sup>8</sup>

<sup>4</sup> Massachusetts General Law Chapter 149, §148, <http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section148>

<sup>5</sup> 455 CMR 2.00, <http://www.mass.gov/lwd/labor-standards/minimum-wage/statutes-and-regs/minimum-wage-regulations-455-cmr-200.html>

<sup>6</sup> Fact Sheet #79C: Recordkeeping Requirements for Individuals, Families, or Households Who Employ Domestic Service Workers Under the Fair Labor Standards Act (FLSA), <http://www.dol.gov/whd/regs/compliance/whdfs79c.htm>

<sup>7</sup> Chapter 151, §1A, <http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter151/Section1A>; *see also*, Footnote 2.

<sup>8</sup> See Footnote 2.



Can I pay a caregiver on a per diem basis?

There is nothing that prevents an employer from paying a caregiver on a per diem basis. However, such payment schemes will not shield you from complying with the recordkeeping requirements described above, or the overtime laws. Here's an illustration:

Caregiver is paid \$160 per diem, and works four 24-hour shifts per week (but she is only paid for 16 hours per shift). The employee's total earnings (before overtime) are as follows:  $160(4) = \$640$ . The "regular rate" is \$640 divided by the total number of hours worked (here, 64 hours), or \$10. Thus, when accounting for overtime, the employee must be paid  $\$10(40 \text{ hours}) + \$15(24) = \$760$ .

Can I pay a caregiver a regular rate, an overtime rate, and then provide her with a "bonus" so that she earns a targeted amount each week?

No. A bonus that is guaranteed is considered a wage and must be included when calculating the employee's "regular rate."<sup>9</sup>

According to the Code of Federal Regulation:

Since the term regular rate is defined to include all remuneration for employment (except statutory exclusions) whether derived from hourly rates, piece rates, production bonuses or other sources, *the overtime provisions of the act cannot be avoided by setting an artificially low hourly rate upon which overtime pay is to be based and making up the additional compensation due to employees by other means.* The established hourly rate is the "regular rate" to an employee only if the hourly earnings are the sole source of his compensation. Payment for overtime on the basis of an artificial "regular" rate will not result in compliance with the overtime provisions of the Act.<sup>10</sup>

Can I calculate and pay overtime on a daily rather than weekly basis? That is, can I pay an employee one rate for the first 8 hours they work per day, and then overtime for any hours over 8 per day?

No, the federal government has prohibited such a "split day" plan. That is, an employer may not "artificially divide" the work day "into two portions one of which is arbitrarily labeled the 'straight time' portion of the day and the other the 'overtime' portion'."<sup>11</sup>

<sup>9</sup> 29 CFR 778.502, <http://law.justia.com/cfr/title29/29-3.1.1.2.37.6.173.3.html>

<sup>10</sup> 29 CFR 778.500, <http://www.law.cornell.edu/cfr/text/29/778/500>

<sup>11</sup> 29 CFR 778.501 (The "split-day" plan) <http://www.law.cornell.edu/cfr/text/29/778/501>

Can employees receive compensatory time instead of receiving overtime payments?

No. If an employee is a non-exempt employee, meaning an employee who is due overtime, the employer may not award compensatory time in place of paying overtime compensation.<sup>12</sup>

If a caregiver is earning different rates during the week, how do I calculate the overtime she is owed?

Where an employee has two or more wage rates during the week (perhaps different assignments have different hourly wage rates, or the employee works both in the office and in the field), the employee's regular hourly rate of pay for that week is the weighted average of such rates. The regular hourly rate for that employee is determined by adding together all earnings for the week and dividing this total by the number of hours worked at all jobs.

The Massachusetts Department of Labor and Workforce Development has provided four examples to help illustrate the "blended wage overtime calculation."<sup>13</sup>

**Scenario 1:** An employee works 40 hours Monday to Friday on prevailing wage work paid at \$30 per hour. He then is assigned on Saturday to work on a private job for 10 hours at the straight-time rate of \$20 per hour. What should the employee be paid for the ten hours of overtime?

**Response:** The employee's regular hourly rate of pay is determined by adding all earnings for the week and dividing by the total hours worked at both jobs:

$$\$1200 + \$200 = \$1400$$

$$\$1400 \div 50 = \$28.00$$

- Employee is due additional half-time pay for the 10 overtime hours

$$(\$28.00 \times 10)$$

Employee must be paid:  $\$1400 + \$140 = \$1540$

**Scenario 2:** An employee works 40 hours Monday to Friday on private work paid at \$20 per hour. He then is assigned on Saturday to work on a prevailing wage job for 10 hours at the straight-time rate of \$30 per hour. What should the employee be paid for the 10 hours of overtime?

<sup>12</sup> <http://www.mass.gov/lwd/labor-standards/minimum-wage/minimum-wage-faqs.html>

<sup>13</sup> <http://www.mass.gov/lwd/labor-standards/minimum-wage/opinion-letters/2001/112701-blended-wage-overtime-calculation.html>

**Response:** The employee's regular hourly rate of pay is determined by adding all earnings for the week and dividing by the total hours worked at both jobs:

$$\$800 + \$300 = \$1100$$

$$\$1100 \div 50 = \$22.00$$

- Employee is due additional half-time pay for the 10 overtime hours

$$(\$11.00 \times 10)$$

Employee must be paid:  $\$1100 + \$110 = \$1210$

**Scenario 3:** An employee works 30 hours Monday to Friday on private work paid at \$20 per hour and 10 hours Monday to Friday on prevailing wage work paid at \$30 per hour. He then works 10 hours on private work on Saturday at the straight-time rate of \$20 per hour. What should he be paid for the 10 hours of overtime?

**Response:** The employee's regular hourly rate of pay is determined by adding all earnings for the week and dividing by the total hours worked at both jobs.

$$[(40 \times \$20) + (10 \times \$30)] = \$1100$$

$$\$1100 \div 50 = \$22.00$$

- Employee is due additional half-time pay for the 10 overtime hours

$$(\$11.00 \times 10)$$

Employee must be paid:  $\$1100 + \$110 = \$1210$

**Scenario 4:** Same scenario as #3, but the employee works 10 hours on prevailing wage work rather than private work on Saturday.

**Response:** The employee's regular hourly rate of pay is determined by adding all earnings for the week and dividing by the total hours worked at both jobs:

$$[(30 \times \$20) + (20 \times \$30)] = \$1200$$

$$\$1200 \div 50 = \$24.00$$

- Employee is due additional half-time pay for the 10 overtime hours

*If an employee works 40 hours, and then gets an additional 8 hours of holiday pay, for a total of 48 hours of pay due for the work week, does the employer have to pay overtime compensation?*

No, overtime is based on hours actually worked during a given work week. Holiday pay for a day when an employee does not work is not included in the 40 hours for purposes of overtime calculation.<sup>14</sup>

*Can I average the number of hours an employee works over a pay period (e.g. two weeks) to avoid overtime pay?*

No. Even though the employer uses a two-week pay period, the law treats each workweek as a single unit. If an employee works 42 hours in one week, the employee must be paid the two hours of overtime, even if the employee only works 20 hours in the subsequent week.

*Are employees who work weekends or holidays entitled to “premium pay?”*

Neither Massachusetts nor the federal government requires extra pay for weekend, holiday, or night work (there is an exception for some retail stores – but this would not apply to your businesses).

*Can I pay a caregiver a different hourly rate depending on the number of shifts she works per week?*

This is perhaps the most frequently asked question we receive! Unfortunately, neither the state nor the federal government has provided a definitive answer, so we will provide the best analysis we have at the time.

Allyson had an informal, off-the-record conversation with one of the assistant Attorney Generals in the Wage and Hour division, who reported that she would interpret the shift differentials as legitimate “premium pay” for those willing to work shorter work weeks. Note, however, that this is only one attorney’s interpretation of the law; she does not speak for the office, nor would her “off-the-record” opinion carry any weight if a company had to defend the practice.

The FAQs released by the DOL seems to suggest that this practice is okay. *See FAQ 46*, which uses as an example an employee who is paid \$50 per shift. On day one, she works 5 hours, so her regular rate of pay is \$10 an hour. On day two, she is paid the same \$50 for the shift, but the shift is 6 hours, and so she makes \$8.33 an hour. This illustration lends support to the argument that employees can be paid different hourly rates for the same work.<sup>15</sup>

*Can I provide my caregivers with gas cards, gift cards or other small “tokens of appreciation?”*

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<sup>14</sup> See Footnote 11.

<sup>15</sup> <http://www.dol.gov/whd/homecare/faq.htm#fc2>  
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You may give these gifts, and they need not count towards an employee's "regular rate" for purposes of overtime calculation, as long as the gifts are truly discretionary. Note, however, that these gifts likely are taxable. According to the IRS,

If your employer gives you a turkey, ham, or other item of nominal value at Christmas or other holidays, do not include the value of the gift in your income. However, if your employer gives you cash, a gift certificate, or a similar item that you can easily exchange for cash, you include the value of that gift as extra salary or wages regardless of the amount involved.<sup>16</sup>

## **Working Time**

### *What is considered "working time" for a caregiver?*

Employers must understand what the state and feds consider "work" to be so that employees are paid for all working time. In short, work includes all time that an employee is on duty, on the employer's premises, or at any other prescribed place of work. In addition, employers must ensure that work not required or requested is not performed ("off-the-clock" work) and also must ensure that employees accurately track and record all hours worked.

The Massachusetts Minimum Wage Regulations, 455 CMR § 2.01, define "working time," generally, as:

All time during which an employee is required to be on the employer's premises or to be on duty, or to be at the prescribed work site, and any time worked before or beyond the end of the normal shift to complete the work. Working time does not include meal times during which an employee is relieved of all work related duties.

### *Must an employer compensate an employee who is "on call"?*

If the employee is exempt from overtime (i.e. is not entitled to overtime), the employee need not be paid extra for being on call.

If a non-exempt employee is required to remain on-call on the employer's premises or so close that the employee cannot use the time effectively for his/her own purposes, the employee is working while on-call. In that case, the time the employee is on-call is counted as hours of work that must be paid.

If a non-exempt employee who is on-call is free to come and go and to engage in personal activities during the call, the time is not hours worked and does not need to be paid unless and until the employee actually responds to a page. However, if an employee is paged so frequently that the employee is not really free to use the off-duty time

<sup>16</sup>

[http://www.irs.gov/publications/p525/ar02.html#en\\_US\\_2011\\_publink1000229124](http://www.irs.gov/publications/p525/ar02.html#en_US_2011_publink1000229124)

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effectively for the employee's own benefit, the intervening periods as well as the time spent in responding to calls would be counted as compensable hours of work.<sup>17</sup>

*Must I pay a caregiver who shows up to a job only to find that the client does not need care (i.e. the family is caring for the client)?*

Yes, an employee must be paid three hours of minimum wage (\$27), if she was (1) scheduled to work three or more hours; (2) reports to work on time and is ready to work; and, (3) is sent home by the employer before his or her scheduled hours have concluded.<sup>18</sup>

*Do I have to pay a caregiver's travel time and expenses?*

Employers must pay travel time and expenses, but not those associate with commuting. What's the difference? **Commuting time** (i.e., travel from home to work or from work to home) is NOT hours worked and need not be paid. On the other hand, **travel time**, or time spent traveling from one position to another throughout the day, counts as working time and must be compensated, and travel expenses must be reimbursed.

The federal Department of Labor recently provided a useful illustration to describe when an employee must be paid when not directly traveling from one client to another.<sup>19</sup>

For example, Tiffany is a direct care worker who is employed by Handy Home Care Agency. She provides services to two of the agency's clients, Mr. Jackson, from 9:00am to 11:30am, and Mr. Smith, from 2:00pm to 6:00pm. Tiffany drives to the two different worksites which are 30 minutes apart. She leaves Mr. Jackson's home at 11:30am and goes to a restaurant for lunch, shops for herself, and then arrives at Mr. Smith's home at 2:00pm.

Because Tiffany is completely relieved from duty long enough to use the time effectively for her own purposes (i.e., lunch and shopping) not all of the time is hours worked. **The 30 minutes required to travel between the two homes is hours worked and, as of January 1, 2015, must be paid by the Handy Home Care Agency even though Tiffany did not travel directly between consumers.**

*Important Points:*

- Tiffany has worked 6 and a half hours: two and a half for Mr. Jackson, four for Mr. Smith, and 30 minutes travel time between the two.

<sup>17</sup> See Footnote 11; see also 29 CFR 785.35, <http://www.law.cornell.edu/cfr/text/29/785/35>

<sup>18</sup> See Footnote 2.

<sup>19</sup> <http://www.dol.gov/whd/homecare/faq.htm#travel>  
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- Remember that travel time must be included when determining whether an employee has worked overtime. Let's assume Tiffany works 40 straight time hours and 2.5 hours of travel. The employer must pay Juanita for 2.5 hours of overtime.
- Employers can pay a different hourly rate for travel time, as long as that rate is at least minimum wage. For example, the employer can pay Tiffany \$10/hour for work with clients, and \$9/hour for her travel time. If employers are going to pay a lower hourly rate for travel, such a disclosure should appear in the offer letter and/or Employee Handbook.
- Employers must reimburse travel (but not commute) expenses, such as mileage or public transportation fares.
- Time when the employee is completely relieved from duty long enough to use the time for his/her own purposes is NOT hours worked. Thus, if an employee has a few hours off between clients, you likely do not need to compensate that time. As a rule of thumb, the employee needs at least an hour of "free time" (i.e. time that does not include any traveling) for her to use the time for her own purposes.

*Is an employee working during "down time," like watching TV while a client is napping?*

Unless the employee is a live-in caregiver (see page 14), you must pay an employee for all hours that she is required to be with a client, regardless of whether the work is active (feeding, changing, cleaning, meal prep) or passive (reading, sitting with the client, relaxing while the client is sleeping).

**Issues Specific to Live-In/24 hour Caregivers**

It is important to note that although a "live-in" caregiver is often used as shorthand for an employee who works a 24 hour shift, the positions are very different under federal and state law.

*What is the definition of a Live-In Caregiver, under the Final Rule adopted by the Department of Labor in September 2013?*

The Department of Labor defines a "live in" caregiver as a person who works in a client's home on a "permanent basis" or for "extended period of time." A caregiver lives with a client on a "permanent basis" if she lives, works and sleeps at the client's home seven days per week and has no other home.

A caregiver lives with a patient for an "extended period of time" when:

- (1) The employee works 120 hours or more each week ***and*** the employee lives, works and sleeps at the client's home for five days a week; or

- (2) The employee sleeps *and* works on the client's premises for at least five consecutive days and nights, even if the employee does not work 120 hours or more each week.

Employees who work for only a short period of time for the household are not considered live-ins because residing on the premises implies more than a temporary activity.

A live-in domestic service worker and the employer may make an agreement excluding from hours worked sleep time, meal time, and other periods of freedom from all duties when the worker leaves the premises or stays on the premises for purely personal matters. The live-in domestic service worker must be paid for all hours worked even if those hours deviate from the agreement.

Does Massachusetts define a "live-in" caregiver the same way?

The Massachusetts wage regulations similarly define a live-in caregiver as an employee "who resides on an employer's premises on a permanent basis or for extended periods of time." 455 C.M.R. 2.03(c). When an employee is a live-in caregiver "not all time spent on the premises is considered working time," such that "the employer and the employee may make any reasonable agreement as to hours worked which takes into consideration all of the pertinent facts."

Although Massachusetts is not required to adopt the federal definition, since it has not previously interpreted the phrase "extended periods of time," it is likely to look to the federal counterpart for interpretive guidance.

What are the record-keeping requirements for "live-in" caregivers under the Final Rule adopted by the Department of Labor in September 2013?

An employer and a live-in domestic service employee may enter an agreement regarding the employee's meal, sleep, and other breaks (i.e., time for which the employee, if completely free from work, need not be paid). To determine whether the employee is working, ask whether the employee has "complete freedom from all duties"; whether she "may either leave the premises" or whether she can "stay on the premises for purely personal pursuits." You must be able to answer yes to each of these questions to deduct hours as nonworking.

The employer must keep a copy of the agreement to deduct nonworking hours. The employer also must also keep accurate records of hours actually worked by the live-in domestic service employee. The employer may assign the employee the task of creating and submitting those records to the employer, but the employer is ultimately responsible for having them.



*For how many hours must I pay a caregiver who is on an overnight assignment, but who does not meet the federal definition of a “live-in” caregiver?*

If a caregiver works at least a 24 hour shift, you may agree with the caregiver to exclude a sleep period of not more than 8 hours. Thus, the answer to this question is 16 hours.<sup>20</sup>

*Important Points:*

- If you are going to deduct up to 8 hours for sleep:
  - The 8 hour sleep period exclusion must be included in the caregiver agreement. If the employee does not agree to this arrangement prior to the engagement, you cannot deduct any time from the employee’s 24 hour shift;
  - The caregiver must be provided with adequate sleeping quarters;
  - You must ensure that the caregiver “can usually enjoy an uninterrupted night’s sleep”;
  - The caregiver must be compensated for any time she is called to duty during the 8 hour period for which she is not otherwise being paid;
  - The caregiver must be compensated for the entire 8 hour “unpaid period” if her sleep is “interrupted to such an extent that the employee cannot get a reasonable night’s sleep.”

*What if a live-in caregiver works less than a 24 hours shift?*

There may be times that a live-in caregiver works a 22 or 23 hour shift. Under a literal reading of the regulations, an employee who works less than a 24 hour shift, and who is required to be at the client’s home the entire time, must be paid for all hours, “even if the employee is permitted to sleep or engage in other personal activities when not busy.” Therefore, you could not deduct the 8 hours of sleep time for a caregiver who works less than 24 consecutive hours.<sup>21</sup> Likewise, the DOL’s FAQs on home health care workers states that “an employee who is required to be at work for less than 24 hours must be paid even though he or she is permitted to sleep or engage in other personal activities when not busy. All the time is counted as work time that must be paid.”<sup>22</sup>

*Must I pay a live-in caregiver for 16 hours if she only “works” 10 hours a day?*

<sup>20</sup> See Footnote 2; 29 C.F.R. § 785.20.

<sup>21</sup> See Footnote 2.

<sup>22</sup> <http://www.dol.gov/whd/homecare/faq.htm#s4a>  
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There is an argument that caregivers are paid for more hours than they actually “work.” This situation may arise if a client frequently sleeps or has family who share in the care-giving. We have been asked whether a caregiver must be paid for the hours she is not providing any caretaking services. The answer depends whether the caregiver is free to leave the client’s home during the time she is not providing care. If the caregiver is required to stay with the client at all times, she must be paid for a minimum of 16 hours, regardless of the number of hours the client actually needs care. (See also, what is “working time.”)

If the caregiver is permitted to leave the premises during the day without the client, i.e. the time is her own to do as she chooses, you may deduct those hours. Note, however, that under 455 CMR 2.03.3.a “an employee required to be on duty at the work site for less than 24 hours is working even if the employee is permitted to sleep or engage in other personal activities when not busy.” Therefore, while you could deduct the hours that the caregiver is off premises, you *could not* deduct the 8 hours sleep time unless the employee ends up working 24 consecutive hours.<sup>23</sup>

*Can I terminate an employee who refuses to enter into an agreement to exclude sleep time?*

No...but there is a “but.” While the employer may not terminate an employee for refusing to enter into or ending a sleep time agreement, the employer is free to establish new conditions of employment such as rate of pay, hours of work, or reassignment. For example, if an employee refuses to enter into an agreement regarding the exclusion of sleep time, an employer might decide to assign that employee only to shifts of less than 24 hours. Likewise, an employer is not required to find the employee alternative assignments.

*Must I ensure that the caregiver receives 8 hours of uninterrupted rest per night?*

You are not required to provide your employees with uninterrupted sleep. If a client literally requires around-the-clock care, you can require your employee to provide such care. However, you cannot deduct any hours for sleep if the employee is working through the night. That is, if a client requires 24 hour care, you would have to compensate the employee for the full 24 hour shift.<sup>24</sup>

*What if a caregiver is awakened several times throughout the night?*

If the interruptions are so frequent that the employee cannot get at least five hours of sleep during the scheduled sleeping period, the entire period must be counted as time spent working and paid accordingly.

<sup>23</sup> See Footnote 2.

<sup>24</sup> See Footnote 2.

*Must caregivers be provided with a meal break?*

Employers must provide employees with a 30-minute meal break after each 6 hours of work. If the employee voluntarily agrees to waive his or her break he or she must be paid for the time worked. The waiver must be in writing.<sup>25</sup>

Note that during an unpaid meal break, a caregiver must be relieved of all duties *and be permitted to leave the premises*. If a caregiver is given time off to eat, but must stay with the client, she must be paid.

*Why should I use a caregiver agreement and what should it include?*

You want to ensure that you and the caregiver agree to the essential employment conditions. At a minimum, the caregiver should understand that (1) she agrees to stay on premises during her meal breaks, and that she will be fully paid for such time; (2) you can deduct 8 hours for sleep per 24 hour shift, unless her sleep is interrupted; (3) the regular rate of pay for the first 40 hours of work, and time and one half for hours worked in excess of 40 per week; (4) she is an at will employee, meaning that she can quit or be terminated at any time, for any reason, with or without cause or notice.

We advise that you draft a separate memo outlining the specifics of each assignment, including the hourly rate and overtime rate. While it is not essential to have the employee “sign off” on the specifics of each assignment, it is a “best practice.”

*Can I deduct money from my caregivers for room and board?*

You can deduct up to \$35 per week for lodging as long as you are actually paying for the room. Thus, your agreement with the client would have to note that you’re taking off \$35 per week for your employee’s use of a room that is “adequate, decent and sanitary lodging, including heat, potable water, and light are furnished.”

You can deduct \$1.50 for breakfast, \$2.25 for lunch, and \$2.25 for dinner as long as the meals actually cost the employer this much money. You may not take any deduction for meals without the written consent of the employee.<sup>26</sup>

We would think it would be more difficult than it is worth to satisfy these regulatory requirements.

**Massachusetts Domestic Workers’ Bill of Rights***What is it?*

<sup>25</sup> M.G.L. c. 149, § 100,  
<http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section100>.

<sup>26</sup> See generally, Footnote 2.  
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This law ensures certain job-related protections to persons who perform domestic work, including caretaking of individuals.

*Does the law apply to home care staffing agencies or other business that provide home care services?*

No, it does **not** apply to staffing agencies or placement agencies licensed or registered under Mass. Gen. Laws Chapter 140, or a personal care attendant who provides services under the MassHealth Personal Care Attendant program.

*Even though this law does not apply to home care agencies, what are its key aspects?*

Persons who employ domestic workers must do the following:

- Pay over-time for all work performed in excess of 40 hours per week;
- Provide for a day of rest in each calendar week (and two consecutive days of rest in each calendar month);
- Adhere to existing regulations regarding wage deductions for food, beverages and sleeping time;
- Refrain from restricting or interfering with a domestic worker's means of private communication;
- Refrain from monitoring or intercepting a domestic worker's private communications or otherwise engage in conduct that constitutes forced services or human trafficking;
- Provide 30 days' lodging or two weeks' severance pay for *live-in* domestic workers terminated without cause;
- Provide each worker with written information about their pay and any benefits, job responsibilities, the process for raising and addressing grievances and additional compensation if new duties are added, the right to collect workers' compensation if injured, written notice of termination, and any other rights or benefits afforded the domestic worker.
- Domestic workers are brought within the scope of the Massachusetts employment discrimination laws.

*Who enforces the law?*

The Massachusetts Attorney General and the Massachusetts Commission Against Discrimination.

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## **Massachusetts Domestic Violence Leave Law**

### *Which employers need provide Domestic Violence Leave?*

Employers with 50+ employees need provide domestic violence leave to their employees.

### *What Domestic Violence Leave does the employer need to provide?*

The employer need provide 15 days of domestic violence leave in any 12-month period to each employee so that the employee may deal with the effects of domestic violence. The employee may need to take such time to: seek medical attention or counseling; obtain a protective order from the court; or meet with a district attorney or other law enforcement officials.

Whether this Leave is paid is in the employer's sole discretion.

### *Requirements for use of Leave:*

- Employees must exhaust any other available leave prior to taking Domestic Violence Leave (the employer may waive this requirement).
- Employees must provide advance notice of the need to take this Leave *unless* there is a threat of imminent danger. In such instances, the employee must still notify the employer within three workdays that the leave is or was being taken under the Act.

### *Prohibited employer activity:*

- Employer cannot take any "negative action" against employees if, within 30 days of the absence, the employee provides certain documentation evidencing the need for the leave. Evidence of an arrest, conviction, or other law enforcement documentation for the abusive behavior is not required.
- No retaliation or discrimination against employees for exercising rights under the Domestic Violence Leave Act.

## **Massachusetts Sick Leave Law**

### *Which employees are covered by the law?*

The law will cover most Massachusetts employees and will apply to both part-time and full-time employees, as well as public and private employees (certain special conditions attach to employees of cities or towns).

What does the law provide?

As of July 1, 2015, Massachusetts employees may earn and use up to 40 hours of sick time each year. Employers will be required to provide their employees a minimum of one hour of sick time per 30 hours worked. Employees will be able to use accrued sick time after 90 days of employment and may “roll over” up to 40 hours of unused sick time to the next calendar year. For the purposes of accruing sick time, the law assumes that employees who are exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) work 40 hours each week, unless their normal work week is less than 40 hours, in which case earned sick time will accrue based on that normal work week.

Paid or unpaid?

The law also mandates that employers with 11 or more employees provide at least 40 hours of paid sick time each calendar year, while employers with 10 or fewer workers must provide up to 40 hours of unpaid sick time per calendar year. Paid sick time will be compensated at the same hourly rate paid to the employee at the time the sick time is used.

Under what circumstances can employees use earned sick time?

Employees will be able to use sick time in order to address their own health needs or those of an immediate family member, including the employee’s children, spouse, parent, or parent of a spouse. Specifically, employees will be able to use sick time to:

- Care for a physical or mental illness, injury or medical condition affecting the employee or a member of his/her immediate family;
- Attend routine medical appointments of the employee or a member of the employee’s immediate family; or,
- Address the effects of domestic violence on the employee or the employee’s dependent child.

Prohibited employer activities:

- Employers may not interfere with an employee’s exercise of earned sick time rights. Employees have a private right of action to enforce their earned sick time rights through the courts.
- Employers may not require an employee either to work additional hours to make up for sick leave absences or to obtain a replacement during an absence.
- Employers may not retaliate against an employee for using earned sick time, nor retaliate against an employee for supporting another employee’s exercise of sick time benefits.

Protections For employers:

- Employers will not have to pay employees for any unused sick time at the end of their employment.
- If an employee misses work for a sick time-eligible reason, but agreed with the employer to work the same number of hours or shifts in the same or next pay period, the employee is not obligated to use earned sick time, and the employer does not have to pay the employee for that missed time. Employers, however, may not require this arrangement.
- The new legislation does not override employers' obligations under any pre-existing contract or benefit plan that contains more generous sick leave provisions. Employers with existing sick time policies that provide as much time off, usable for the same purposes and under the same conditions as the new law, are not required to provide additional sick time to employees.
- Employers may require certification of the need for sick time if an employee used sick time for more than 24 consecutively-scheduled work hours. One caveat attaches here: employers cannot delay the taking of or payment for earned sick time because they have not received said certification.
- In an effort to recognize the planning and staffing needs of employers, the law also requires employees to make a good faith effort to notify the employer in advance of using sick time, if the need for sick time is foreseeable.

Recommendations:

As the new sick time provisions will not be in effect until July 1, 2015, employers have ample time to plan for them and adjust their policies and procedures accordingly.

In the event that employers do not have outstanding sick time policies providing as much time off as the sick time law, usable for the same purposes and under the same conditions, it is suggested that employers draft and circulate a policy to employees regarding sick time benefits and procedures. Employers that already provide at least 40 hours of paid leave per year in the form of vacation, personal or sick time (PTO), need not provide additional "time off" to comply with the law, as long as employees may take that leave for purposes related to sick leave or domestic violence. Employers should also implement a system for tracking employee earned and used sick time.

**Massachusetts Parental Leave Law**Overview

The new law – "An Act Relative to Parental Leave" – replaces the now-defunct Massachusetts Maternity Leave Act (the "MMLA"), and for the first time in

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Massachusetts, extends to men the right to take 8 weeks of parental leave for the birth or adoption of a child.

*The problem:*

Previously, the Massachusetts Maternity Leave Act, M.G.L. c. 149, § 105D, applied exclusively to female employees, such that smaller employers who were not covered by the Family and Medical Leave Act (the “FMLA”) were not required to offer parental leave to men.

Since 2008, however, the Massachusetts Commission Against Discrimination (the “MCAD”) has taken the contrary position, that an employer’s failure to provide such leave to men violates the Commonwealth’s anti-discriminations laws.

Under the new Parental Leave law, employers now have certainty: they must provide such leave to men on the same terms and conditions as leave is provided to women.

*What are the new statute’s substantive changes?*

- The new statute amends the Commonwealth’s maternity leave law, M.G.L. c. 149, § 105D, and its antidiscrimination law, M.G.L. c. 151B, § 4(11A), by making both statutes gender neutral.
- If an employer provides parental leave for longer than 8 weeks and does not intend to honor the job protections built into the Act, it must provide written notification to employees taking leave.
- This new provision addresses the issue raised in the 2010 Supreme Judicial Court case – *Global Naps* – that held that employees who take a leave under the MMLA are only entitled to the statute’s protections for eight weeks, regardless of any promises an employer made about extending the leave. This new provision also adopts what the MCAD Guidelines previously had required.

*Who is covered?*

Any employee who:

- Works for employers with 6 or more employees; and,
- Has completed their employer’s initial probationary period (which is not to exceed three months), or, has been employed by the same employer for at least 3 consecutive months as a full-time employee (whichever is shorter).

*What is the length of the leave?*

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8 weeks. However, employers also subject to the FMLA have additional obligations (see below).

Must the leave be paid?

No. It is at the discretion of the employer to provide paid or unpaid leave.

What is protected, and when are the protections afforded?

Job protection and restoration are afforded for the:

- Purpose of giving birth;
- Placement of a child under the age of 18 (i.e. fostering a child);
- Placement of a child under the age of 23, if the child is mentally or physically disabled; and,
- Adoption – or intention to adopt – a child.

What does job protection and restoration mean?

Employees shall be restored to their previous, or a similar, position with the same status, pay, length of service credit and seniority as of the date of the leave.

Are there any limitations or employee requirements?

Yes.

- Any two employees of the same employer shall only be entitled to 8 weeks of parental leave in the aggregate;
- Employers are not required to restore an employee on leave if similarly situated employees (i.e. employees with similar length of service, credit and status, who are in the same or similar positions) have been laid off due to economic conditions or other changes in operating conditions;
- Employees must provide two-weeks' notice before the date they intend to take leave; if two weeks' notice is not possible for reasons beyond the employee's control, the employee must provide notice as soon as practicable;
- Employees must indicate to the employer their intention to return to work;
- Employers need not provide the cost of any benefits, plans or programs during leave unless the employer provides for such benefits to all employees who are on a leave of absence. That is, if an employer continues its contribution to benefits for an employee on a medical or personal leave of absence, it must provide the same contribution to employees taking parental leave.

Interaction between the Massachusetts Parental Leave Act and the FMLA:

The amended law does not change any obligation for employers that also are subject to the Family and Medical Leave Act. In addition:

- All employers subject to the FMLA (that is, employers with at least 50 employees within a 75 mile radius, and the employee seeking leave has worked at least 1,250 hours over the prior year) also are subject to the Massachusetts parental leave statute;
- Under the Massachusetts law, employers cannot require employees to exhaust PTO during their parental leave; under the FMLA, employers may make such a requirement;
- The two laws may, but do not necessarily, run concurrently. That is, an employee may take 12 weeks of FMLA leave *prior* to giving birth, *and then*, take 8 weeks of leave under the Massachusetts leave law. However, if an employee does not take leave prior to giving birth, she is entitled to a maximum of 12 weeks leave after giving birth. *Caveat*: an employee may be entitled to additional leave as a reasonable accommodation under the disability laws.

Tips and take-aways:

- Employers may need to revise their maternity/parental leave policy to ensure that the policy is gender-neutral;
- Employers should determine how they will notify employees of their rights to parental leave; and,
- If employers provide leave in addition to the 8 weeks, they must provide the same amount of leave to men as they provide to women, and on the same terms (i.e. paid vs. unpaid).