



**Wage and Hour Compliance
Memorandum**

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

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

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Disclaimer: We hope this guide will help to inform home care agencies of the key employment 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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I. RECORD-KEEPING AND PAYROLL

(1) 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.¹

Massachusetts General Laws, C. 151 § 15

Massachusetts 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.

¹ 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>

Employers must retain such records for all employees for **three years**.

Massachusetts personnel records statute

Mass. Gen. Laws C. 149, §52C² requires employers with 20 or more employees to maintain the following employment records as part of the employee's personnel record:

- 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;
- 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.

(2) 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.³

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.

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

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

(3) How often must employees get paid?

Employees who are nonexempt must be paid every week or every other week. 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.⁴

(4) 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.⁵

(5) 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.⁶ See page 15 for more information.

II. OVERTIME

(1) 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 \$10.00 per hour.⁷

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

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

⁶ 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>

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

(2) 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.⁸

(3) 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 $\$10(40 \text{ hours}) + \$15(24) = \$760$.

(4) 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."⁹

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.¹⁰

(5) 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

⁸ See Footnote 2.

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

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

arbitrarily labeled the ‘straight time’ portion of the day and the other the ‘overtime’ portion’.”¹¹

(6) 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.¹²

(7) 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.”¹³

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

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

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

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

hours at the straight-time rate of \$30 per hour. What should the employee 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:

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

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

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

$$(\$22.00 \times 10)$$

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

$$(\$22.00 \times 10)$$

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

(8) 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.¹⁴

(9) 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.

(10) 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).

(11) 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.¹⁵

¹⁴ See Footnote 11.

¹⁵ <http://www.dol.gov/whd/homecare/faq.htm#fc2>

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

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.¹⁶

III. WORKING TIME

(1) What is considered “working time” for a caregiver?

Employers must understand what the state¹⁷ and feds consider “working time” so that employees are appropriately and timely compensated. In short, compensable 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.

In August 2015, the Massachusetts Attorney General issued regulations pursuant to the recently enacted Domestic Workers’ Bill of Rights. These regulations apply, with limited exceptions, to all individuals who perform work of a domestic nature in a household. The rules define “working time” as:

Compensable time that includes all time during which a domestic worker is required to be on the employer's premises or to be on duty and any time worked before or beyond the end of the normal scheduled shift to complete work.

Working time shall include meal periods, rest periods, and sleep periods *unless*:

- (a) a domestic worker is free to leave the employer's premises and use the time for the domestic worker's sole use and benefit and is completely relieved of all work-related duties; or

¹⁶ http://www.irs.gov/publications/p525/ar02.html#en_US_2011_publink1000229124

¹⁷ 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.”

- (b) a domestic worker on duty for 24 consecutive hours or more enters into a written agreement with the employer pursuant to 940 CMR 32.03(2) in a manner described under 940 CMR 32.04(3) to exclude such periods from working time.¹⁸

Guidelines for such written agreements are further discussed in [Section V](#), below.

(2) Must an employer compensate an employee who is “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 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. In other words, 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).¹⁹ See exception for 24 hour caregivers in [Section V](#).

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 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.²⁰

(3) 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 (\$30), 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.²¹

(4) 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.

¹⁸ 940 CMR 32.02

¹⁹ 454 CMR 27.04(2)

²⁰ See Footnote 11; see also 29 CFR 785.35, <http://www.law.cornell.edu/cfr/text/29/785/35>

²¹ See Footnote 2

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.²²

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.
- 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.

(5) 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 stated in writing.²³ Such written agreement to exclude meal periods from working time shall be entered into prior to performance. Note

²² <http://www.dol.gov/whd/homecare/faq.htm#travel>

²³ M.G.L. c. 149, § 100,
<http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section100>.

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.

(6) How should employers keep track of a caregiver's working time?

Employers must provide domestic workers, who work 16 or more hours per week, with a time sheet in either hard copy or electronic format. The time sheet must be provided at least once every two weeks, and must show all the compensable time worked every day in the preceding two weeks. Employers must also provide domestic workers an opportunity to review and sign the time sheet. If a domestic worker disagrees with the employer's records, she must be given an opportunity to note on the timesheet the number of hours she believes to have worked. Please keep in mind that any dispute about the hours worked does not relieve the employer of its obligation to pay wages in accordance with Massachusetts wage laws. The meal break issue for live-in caregivers is addressed in [Section V, Question 3 and 4](#).

IV. MASSACHUSETTS DOMESTIC WORKERS' BILL OF RIGHTS

(1) What is it?

This law ensures certain job-related protections to persons who perform domestic work, including caretaking of individuals.

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

Yes, the law applies to home care agencies that directly employ workers to perform services of a domestic nature. However, it does not apply to staffing agencies or placement agencies that place or refer domestic employees and are licensed or registered under Mass. Gen. Laws Chapter 140, or to personal care attendants who provide services under the Mass Health Personal Care Attendant program.

(3) What are the law's key aspects?

Persons who employ domestic workers must do the following:

- Before an employee begins work, provide the employee with a copy of the Attorney General's "Notice of Your Rights as a Domestic Worker," which can be found at the following link: <http://www.mass.gov/ago/docs/workplace/domestic-workers/dw-notice-of-rights.pdf>.
- 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 lodging.
- Adhere to existing regulations regarding exclusion of sleep time, meal periods, and rest periods from hours worked.
- Refrain from unreasonable restrictions on a domestic worker's private communications during work time;
- Refrain from infringing on an employee's privacy by monitoring or recording their use of restroom facilities, sleeping or private living quarters, or monitoring or intercepting private communications.
- Refrain from any conduct which 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 (explained further in response to Question 4) 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.

(4) Why should I use a written agreement and what should it include?

An employer is required to enter into a written agreement with an employee who works for **16 hours or more per week**.²⁴ Such written agreement must be retained for three years from the date when services were performed. At a minimum, the agreement should include:

- (1) the regular rate of pay for the first 40 hours of work, time and one half for hours worked in excess of 40 per week, and additional compensation for added duties or multilingual skills;
- (2) working hours, including meal periods and other time off;
- (3) the responsibilities, including regularity, associated with the job;
- (4) any fees or other costs, including costs for meals and lodging;

²⁴ 940 C.M.R. 32.04(3)

- (5) the process for raising and addressing grievances and additional compensation if new duties are added;
- (6) the right to collect workers' compensation benefits if injured on the job;
- (7) any additional benefits afforded to the domestic worker by the employer; and
- (8) the required notice of employment termination by the employer and by the domestic worker.

Also, if applicable to the employment arrangement, the written agreement should include: (1) the provisions for days of rest, sick days, vacation days, personal days, holidays, transportation, health insurance, severance and yearly raises and whether or not earned vacation days, personal days, holidays, severance, transportation and health insurance costs are paid or reimbursed; and (2) the circumstances under which the employer may enter the domestic worker's designated living space on the employer's premises.

For live-in²⁵ domestic workers only, the written agreement should provide a description of what the employer deems as cause for purposes of immediate termination and removal within 48 hours from the employer's home without severance pay. An employer need not list all conduct that would constitute cause for termination but shall make a good faith effort to describe the circumstances that would result in the worker's loss of lodging and severance.

The Attorney General has provided the following model employment agreement: <http://www.mass.gov/ago/docs/workplace/domestic-workers/dw-sample-employment-agreement.pdf>

(5) Who enforces the law?

The Massachusetts Attorney General and the Massachusetts Commission Against Discrimination. Individuals also have a private right of action against employers who violate the law.

V. 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, federal and state law define them differently.

(1) 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

²⁵ As explained earlier in this Memo, the Domestic Workers’ Bill of Rights and its accompanying Attorney General Regulations do not define live-in employees.

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” if she either (a) works 120 hours or more each week ***and*** lives, works and sleeps at the client’s home for five days a week; or (b) 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.

(2) Does Massachusetts define a “live-in” caregiver the same way?

No, the Domestic Workers’ Bill of Rights and accompanying Regulations do not define “live-in” caregivers. Instead, they create two categories of employees – those who work fewer than 24 consecutive hours, and those who work 24 or more consecutive hours.²⁶

(3) Can an employer deduct sleep time, meal breaks and rest periods from an employee’s wages?

For caretakers who work shifts of 24 hours or more, an employer may exclude up to eight (8) hours of sleep time per 24-hour shift, so long as the employee and employer have entered into a written agreement to do so, (see Question 4 below), and so long as the employee is usually able to enjoy an uninterrupted night’s sleep.²⁷

The issue of meal breaks and rest periods is a frustrating issue for employers because the state and federal laws differ. Massachusetts permits employers, pursuant to such written agreements, to deduct meal and rest breaks from the working time of caregivers working 24-hour (or longer) shifts. In the absence of a pre-existing written agreement, such periods constitute working time and must be paid.²⁸

However, the federal FLSA standard is more employee-friendly. It only permits meal and rest break deductions for live-in caregivers, as we have described that federal government’s definition of that term in Section V(1), above. This means that employers must follow the conditions set forth in the federal standard, or risk being the subject of a federal wage suit. Why? Because when federal and state laws conflict, the U.S. Department of Labor requires employers to follow the law that provides the highest standard of protection to employees.

²⁶ Although the Massachusetts wage regulations 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,” (454 CMR 27.04) this definition is not reflected in the more recently enacted regulations accompanying the Domestic Workers’ Bill of Rights.

²⁷ The DOL has opined that this means that an employee should be able to enjoy at least five (5) consecutive hours of sleep more than half the time. See DOL Wage and Hour Division, Field Assistance Bulletin No. 2016-1.

²⁸ 940 CMR 32.03(2) and 454 CMR 27.04(3)(b) and (c)

(4) What should a written agreement to exclude meal, sleep, and rest periods include?

A written agreement to exclude meal periods, rest periods, and sleep periods from working time shall:

- (a) be in a language easily understood by the domestic worker;
- (b) be entered into prior to performance of services;
- (c) specify the meal periods, if any, which the domestic worker agrees are not working time;
- (d) specify rest periods, if any, which the domestic worker agrees are not working time;
- (e) specify sleep periods, if any, which the domestic worker agrees are not working time; and
- (f) be signed or acknowledged (whether in writing or by means of electronic communication) by the domestic worker and the employer.²⁹

The state regulations also require employers to provide “adequate, decent, and sanitary sleeping quarters,” which allow the domestic worker to “enjoy sleep uninterrupted by duties.”³⁰

(5) What are the record-keeping requirements for 24+ hour/live-in caregivers?

Under the Final Rule adopted by the DOL in September 2013, 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.³¹

(6) What if a live-in caregiver works less than a 24-hour 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.³² Likewise, the DOL’s FAQs on home health care workers

²⁹ 940 CMR 32:03(2)

³⁰ The federal regulations require employers to provide “live-in” caregivers with “private quarters in a homelike environment. The DOL defines “private quarters” as “living and sleeping space that is separate from the person receiving services.” For employees who work shifts of 24 hours or more, the federal regulations require employers to provide “adequate sleeping facilities.” Field Assistance Bulletin No. 2016-1.

³¹ The state regulations also require employers to keep a true and accurate record of wages and hours for all employees for three years in accordance with M.G.L. c. 151, § 15 (as explained in response to [Question 1](#)).

³² See Footnote 2.

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.”³³

(7) 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.

(8) 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.³⁴

(9) 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. See Question V (3) above.

(10) 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 written 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.³⁵

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

³³ <http://www.dol.gov/whd/homecare/faq.htm#s4a>

³⁴ See Footnote 2.

³⁵ See generally, Footnote 2.

VI. MASSACHUSETTS DOMESTIC VIOLENCE LEAVE LAW

(1) Which employers need provide Domestic Violence Leave?

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

(2) 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.

(3) 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.

(4) 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.

VII. MASSACHUSETTS SICK LEAVE LAW

(1) 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).

(2) 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.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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.

VIII. MASSACHUSETTS PARENTAL LEAVE LAW(1) 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 Massachusetts, extends to men the right to take 8 weeks of parental leave for the birth or adoption of a child.

(2) 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.

(3) What are the 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.

(4) 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).

(5) What is the length of the leave?

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

(6) Must the leave be paid?

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

(7) 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.

(8) 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.

(9) 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.

(10) 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.

(11) 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).