

Mass. Cos. With Tipped Employees Face New Wage Laws

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The approaching new year will bring added wage compliance obligations to Massachusetts employers with tipped employees. The regulatory environment in Massachusetts provides employees with some of the most generous protections and rights in the country, with frequent and expensive litigation as an inevitable byproduct. Now, employers with tipped employees should revisit how they calculate wages — or risk getting swept into the next onslaught of class actions. Beginning on Jan. 1, 2019, employers must calculate the wages of their tipped employees at the end of each shift. This new requirement for wage calculations is a departure from the current practice of many businesses, where wage calculations often are performed weekly. This change also could create additional administrative burdens and headaches for employers that administer mandatory employee tip pooling arrangements. Employers should be proactive with compliance to help avoid underpaying tipped employees and minimize exposure to liability and damages under the strict Massachusetts Wage Act.

The Grand Bargain Legislation

These changes to the wage calculations for tipped employees were part of a so-called grand bargain legislative compromise struck by business and industry groups, employee advocates and other stakeholders to avoid several ballot initiatives in the November 2018 election. Those ballot initiatives sought to increase the minimum wage, implement paid family and medical leave through payroll taxes, and reduce the sales tax and create an annual tax-free weekend.

On June 28, 2018, Gov. Charlie Baker signed House Bill 4640,[1] titled “An Act Relative to Minimum Wage, Paid Family Medical Leave, and the Sales Tax Holiday.” This legislation focused on annual increases in the minimum wage and the service rate for tipped employees, until the minimum wage reaches \$15 per hour in January 2023; annual reductions and the eventual elimination by January 2023 of the “Blue Laws” requiring Sunday and holiday premium pay for retail employees; and the implementation of a state-administrated paid family and medical leave program.

Calculating Wages for Tipped Employees

Although not widely reported, the grand bargain legislation modifies how employers must calculate the wages of their tipped employees. Effective Jan. 1, 2019, General Laws Chapter 151, Section 7[2] requires employers to calculate whether the amount of their tipped employees’ cash wages and tips for each shift is at least equal to what the employee would be entitled to if they were paid

minimum wage. If tipped employees participate in a tip pool, then the employer must take into account the employees' share of the tip pool for each shift during the pay period.

This new wage calculation will affect any tipped employees that are paid an hourly cash wage less than the minimum wage, also called a "service rate."^[3] If any tipped employees' cash wages and tips earned during a shift are less than the minimum wage, then the employer will have to compensate those employees with additional amounts representing the difference between: (1) the amount of minimum wages the employee would be entitled to for the particular shift; and (2) the amount of cash wages and tips the employee actually earned during that shift.

An earlier version of this legislation would have required employers to pay their tipped employees at the end of each shift. That type of radical change would have been disruptive and untenable for many employers. Fortunately, the final version of this bill enacted by the House and Senate, and signed by Baker as Chapter 121 of the Acts of 2018,^[4] did not include the "payment" language. Nonetheless, some businesses still may find it challenging to perform this calculation at the close of each shift.

Although the practices of some employers may already comply with this new wage calculation requirement, other employers may have to make significant adjustments to their payroll policies and processes to comply with the grand bargain legislation. It is common practice for many businesses to perform minimum wage calculations for their tipped employees for each pay period, typically weekly, but not necessarily for each shift during that pay period. Similarly, many businesses in the hospitality industry apportion or calculate the shares of mandatory employee tip pooling arrangements on a pay period or weekly basis. This approach is no longer permitted as of Jan. 1, 2019.

From some of the legislative testimony available, it appears that this statutory change was motivated by concerns that slow shifts, where an employee may not earn much in tips, were being counterbalanced or subsidized by busier shifts for the employee during the same pay period. Theoretically, an employee could earn less than minimum wage during particularly slow shifts, but make up for those slow shifts during the remainder of the pay period if the employee was busier and earned enough tips to make up for the slow shifts.

How Should Massachusetts Employers Respond?

Compliance with this new regime for wage calculations may involve additional administrative and reporting burdens, and adjustments to tip pooling arrangements. With the complexities of state and federal wage-and-hour laws and regulations, as well as frequent legal and compliance developments in this area, businesses are well served to revisit their compensation practices on a regular basis to ensure compliance.

Before the end of the year, employers in Massachusetts with tipped employees may want to consider taking proactive steps to audit their compensation policies and procedures. Each employer will face its own unique set of compliance concerns. At a minimum, employers would be well advised to work with their human resources departments, time-keeping and payroll processing vendors, and legal counsel to ensure the employer has accurate information about current

compensation practices for tipped employees and a full understanding about its time-keeping and payroll technologies and processes. Depending on the number of tipped employees, shifts and locations for a particular employer, this work could be either relatively painless or time consuming. Issues surrounding tipped employees historically have been fertile ground for the plaintiffs bar. The investment of time and resources into proactive compliance efforts will invariably outweigh the considerable time, resources and costs required to defend against class action litigation.

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[1] <https://www.bostonglobe.com/news/politics/2018/06/27/baker-sign-grand-bargain-bill-thursday/LpYa7ZlxxyzTVfEFvZOKnI/story.html>

[2] <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter151/Section7>

[3] <https://www.dol.gov/whd/state/tipped.htm>

[4] <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter121>