

## Liquidated Damages Cannot Penalize

*by Sean B. Cullen, Esq.*

A liquidated damage provision can be an effective contractual tool to predetermine the amount of damages a party must pay if there is a breach of the contract. Liquidated damage provisions are intended to provide parties with certainty of result by allowing them to agree in advance to a sum certain. That sum is intended to be a reasonable estimate of potential damage in the event of a breach. As illustrated by a recent Massachusetts Appeals Court decision, however, a liquidated damage provision that serves as a penalty for a breach of the contract, rather than a reasonable estimate of potential damage, will not be enforced.

The decision concerned a provision of a commercial lease that entitled the tenant to actual damages plus \$500 for each day items identified on a punch list, such as HVAC maintenance and repair, remained uncompleted after thirty days. Liquidated damage

provisions negotiated between sophisticated parties are presumptively valid, provided that: (1) actual damages are difficult to calculate at the time of contract formation; and (2) the agreed upon sum represents a reasonable estimate of potential damage in the event of a breach. As the Appeals Court noted, however, the provision of this lease was not a liquidated damage provision at all. By awarding a sum above the tenant's actual damages, this provision guaranteed that the liquidated damage calculation would exceed, and perhaps vastly exceed, the actual damage calculation. Rather than provide the parties with certainty of result by allowing them to agree to a sum certain based on a reasonable estimate of potential damages, this lease provision simply added a \$500 daily fine to the tenant's actual damage calculation. The Appeals Court determined that this lease provision was an unenforceable penalty and therefore limited the damages to the tenant's actual damages.

---

## Massachusetts Wage and Hour Regulations – A Primer

*by Adam J. Shafran, Esq.*

Massachusetts has established comprehensive regulations under 454 CMR 27.00 to clarify and expand upon the state's wage laws. Below, we'll explore key aspects of these standards to help employers and employees better understand their rights and responsibilities.

### Minimum Wage and Overtime Provisions

#### Basic Minimum Wage

Employers must pay at least the basic minimum wage unless explicitly granted a waiver under specific legal conditions.

#### Tipped Employees

The total compensation for tipped employees, including the service rate and tips received, must equal or exceed the basic minimum wage. To comply, employers must:

1. Notify employees in writing about tipping regulations and the service rate.
2. Ensure employees retain all their tips, unless tips are distributed via a lawful tip-pooling arrangement.
3. Pay employees the full minimum wage if the tipping conditions are not met.

#### Overtime Pay

Non-exempt employees are entitled to overtime pay at 1.5 times their regular hourly rate for any hours worked over 40 in a single week. For tipped employees, the overtime rate is calculated based on the basic minimum wage rather than the service rate.

#### Reporting Pay

Employees who report for scheduled work of three or more hours must receive at least three hours of pay at the minimum wage if they are sent home early.

#### On-call Time

Employers must compensate on-call time unless the employee can freely use the time for personal purposes while waiting to be called.

#### Travel Time

- Ordinary Commutes: Travel between home and work is not compensable.
- Employer-required Travel: Travel beyond ordinary commutes for work purposes is compensable and must be paid at the applicable rate.

#### Sleeping Time

For employees working shifts of 24 hours or more, meal and sleep periods may be excluded from compensable

*(continued on page 3)*

## Massachusetts Wage and Hour Regulations – A Primer

(continued from page 2)

hours if these periods are pre-agreed in writing and remain uninterrupted.

### Permissible Deductions

Employers are allowed to make deductions from an employee's wages only under specific conditions:

- **Lodging:** Employers may deduct lodging costs from wages, but only if the employee has voluntarily agreed in writing. The maximum allowable deduction is \$35 per week for single occupancy. The lodging provided must meet safety and health standards as outlined by relevant regulations.
- **Meals:** Employers may deduct the cost of meals, up to \$6.00 per day for three meals, provided the employee voluntarily accepts them. The meals must meet reasonable nutritional and quality standards.
- **Other Authorized Deductions:** Employers may deduct for items such as health insurance premiums, union dues, or retirement contributions, but only if the employee has explicitly authorized these deductions in writing.

### Uniforms

If a uniform requires special cleaning or maintenance, the employer must either provide the cleaning services or reimburse the employee. Uniforms that are "wash and wear" do not require employer reimbursement.

### Prohibited Deductions

Employers may not deduct fees or costs from employees' wages unless explicitly permitted by law. Unauthorized deductions, including those for cash shortages, breakages, or customer theft, are strictly prohibited and may lead to legal penalties.

### Notice and Recordkeeping

Employers are required to:

- Post notices in the workplace outlining minimum wage laws, in both English and any other language spoken by at least 5% of the workforce.
- Maintain detailed and accurate records of hours worked, wages paid, and deductions made for a minimum of three years.
- Provide employees with access to their employment records within 10 business days upon request.

### Conclusion

Massachusetts is known for its detailed employee-friendly laws. The above are just a few examples. For comprehensive details, consult the full text of 454 CMR 27.00 or reach out to Rudolph Friedmann for further guidance.

## Firm News

### Recent Successes

#### **Court Orders Contractor to Pay Attorney's Fees Under Massachusetts General Law Chapter 231, § 6F**

**Jon Friedmann** and **Casey Sack** successfully secured a decision under Massachusetts General Law Chapter 231, § 6F to have the plaintiff pay a portion of the firm's attorneys' fees. The decision arises from a residential construction dispute. Under Chapter 231, § 6F, the court may impose sanctions against a party represented by counsel whose claims are "wholly insubstantial, frivolous and not advanced in good faith." A party's claim is frivolous where "there is an absence of legal or factual basis for the claim, and if the claim is without even a colorable basis in law." Read more about the firm's success at <https://tinyurl.com/yrkms2pd>.

**Jon Friedmann** also obtained a favorable verdict from the Massachusetts Superior Court after a three-day jury-waived trial in a real estate dispute over a property on

Martha's Vineyard. Jon represented the sellers in a case involving buyers who alleged multiple claims, including breach of contract and misrepresentation, stemming from a real estate purchase and sales agreement. The court found in favor of the firm's clients highlighting the absence of any breach of the agreement or misrepresentation. Read more about the decision at <https://tinyurl.com/35kc599k>.

**Bobby Rudolph** represented a supplier who sold and delivered materials on credit to a subcontractor on three large-scale construction projects. Prior to paying the supplier for the materials, the subcontractor filed for bankruptcy. The total value of the goods sold and delivered to the three projects was \$500,000.00. Bobby filed mechanic's liens on the three projects and pursued payment bond claims on behalf of the client. Bobby also represented the client's interests in the subcontractor's bankruptcy proceeding. In less than six months, Bobby negotiated agreements with all three general contractors resulting in payment in full to RF's client for the materials.

(continued on page 4)