

## **CLIENT ALERT: Further Changes to Massachusetts Holiday Premium Pay Requirements and Expansion of the Tips Act**

As the retail and hospitality industries continue their efforts to recover from the COVID-19 pandemic, it is worth highlighting and summarizing recent legislative changes which should bring welcome relief. On January 14, 2021, Governor Charlie Baker signed an economic stimulus bill into law which includes changes to Massachusetts' retail holiday premium pay requirements as well as the Massachusetts Tips Act (M.G.L. c. 149, § 152A) (the "Tips Act").

### **Premium Pay Requirements for New Year's Day, Veterans Day and Columbus Day - Fixing the Glitch from the "Grand Bargain"**

One of the key concessions to retail businesses as part of the 2018 "Grand Bargain" was the five-year reduction of the premium pay obligations for hours worked on Sundays and various holidays (see our prior [client alert](#) for more details). The Grand Bargain neglected to include three holidays in its changes at the time: New Year's Day, Veterans Day and Columbus Day. The economic stimulus bill finally corrected this glitch to bring the premium pay requirements for these holidays in line with other applicable holidays (Memorial Day, Juneteenth, Independence Day and Labor Day).

As a result of the Grand Bargain and January's economic stimulus bill, the retail premium pay requirements for Sundays and each of the applicable holidays shall now be 1.2 times an employee's regular rate in 2021 (with the exception of New Year's Day, since it already occurred) and 1.1 times an employee's regular rate in 2022. As of January 1, 2023, these retail premium pay requirements shall be eliminated entirely.

While the reduction and eventual elimination of these premium pay requirements is welcome news, retail employers must ensure continued compliance with other overtime pay obligations - including the usual requirements for overtime after 40 hours in a week under state or federal law.

Retail employers should also be mindful of the blue laws' voluntariness provisions. These provisions prohibit most retailers from requiring employees to work on Sundays and the holidays discussed above; and they further prohibit these employers from punishing or retaliating against employees for refusing to work on these days.

### **Expanding the Scope of "Wait Staff Employees" Under the Tips Act**

Through the signing of January's economic stimulus bill, Massachusetts expanded the scope of employees who may be eligible to receive tips and to participate in tip pools by making two key amendments to the definition of "wait staff employee" under the Tips Act.

First, the definition of "wait staff employee" was expanded to include a "person in a quick service

restaurant who prepares or serves food or beverages as part of a team of counter staff[.]” Thus, an employee who works as part of a counter team in quick service restaurants (e.g., coffee shops) should now be eligible to receive tips from a customer even if that employee did not directly interact with the customer.

Second, and likely more impactful, the definition of “wait staff employee” was amended to provide that employees who have managerial responsibilities can potentially still be considered “wait staff employees” for days in which they do not have any managerial responsibility. This amendment significantly expands the scope of employees who may be eligible to receive tips on any given day (e.g., an employee who works as a shift supervisor on some days, but not others).

Employers should proceed cautiously. To successfully argue that one is a “wait staff employee” on a particular day, the employer should be prepared to demonstrate that the employee has no actual (and potentially no implied) supervisory authority during the day at issue. As many employers know all too well, the consequences of failing to handle these or other Tips Act issues properly can be significant with liability under the Tips Act including an automatic trebling of damages and award of attorneys’ fees. In addition, employers must also still be mindful of the federal Fair Labor Standards Act’s restrictions on the ability of managers and supervisors to retain tips or participate in tip pools.

MBJ will continue to monitor these issues for any guidance from the Office of the Attorney General or the courts. In the meantime, please contact your MBJ attorney with any questions you may have regarding these or any of the other legal changes addressed above.

*Sean P. O’Connor, who is a partner with Morgan, Brown & Joy, LLP, authored this client alert. Sean may be reached at (617) 523-6666 or at [soconnor@morganbrown.com](mailto:soconnor@morganbrown.com). Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.*

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