

# Which Employees in Massachusetts are Eligible to be Paid as Tipped Service Employees?

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While most Massachusetts employers often know when they can and cannot classify an employee as paid hourly or paid a salary as an exempt employee under the federal Fair Labor Standards Act, occasionally an employer will ask whether it must pay its hourly paid employees the minimum wage (which is \$8 per hour at the time of this writing) or whether it meets the criteria to pay them the lower, current “tipped Service Employee” rate of \$2.63 per hour.

## MASSACHUSETTS SERVICE EMPLOYEE STATUTE AND REGULATION

Under Massachusetts law, a Service Employee is defined in MGL 149, § 152A as:

*“... a person who works in an occupation in which employees customarily receive tips or gratuities, and who provides service directly to customers or consumers, but who works in an occupation other than in food or beverage service, and who has no managerial responsibility...”* MGL 149, § 152A

Under Massachusetts law, any employer that is employing tipped Service Employees additionally must comply with the following provisions within the Code of Massachusetts regulations in order to pay them that rate. 455 CMR 2.02. Looking at both the Regulation and the statute, they collectively provide that an employer may pay the Service Employee rate only if:

- (a) It is actually paying the employee not less than \$2.63 per hour for every hour actually worked — not just the time he or she is servicing a customer;
- (b) The employer has first informed the employee of the provisions of paragraph 3 of MGL 151, § 7;
- (c) The employee actually received tips in an amount that, when added to the service rate of \$2.63 per hour, equals or exceeds the basic minimum wage (which is \$8 per hour at the time of this writing); and
- (d) All tips received by the employee were either retained by him or her or were distributed to him or her through a tip-pooling arrangement.

## ILLUSTRATIONS

1. If a Service Employee waitress works for 20 hours in a given pay period when one includes all time spent doing preparation work and post-customer side work, under the current Massachusetts minimum wage, that Service Employee must earn at least \$8 per hour worked, or \$160, between tips and his or her hourly service rate over that pay period. If the Service Employee earned \$150 in tips during that pay period, the employer may deduct that \$150 of tips from the \$160 minimum that the Service Employee must earn over that pay period. The employer is responsible for the remaining \$10 due, or \$2.63 per hour for each hour worked, *whichever is higher*. Since \$2.63 per hour for the 20 hours worked is \$52.60 and that figure is higher than \$10, the employer must pay the \$52.60 in wages for the pay period. From this example, the reader sees that the employer may not adjust downward the \$2.63 paid per hour even though the employee will be earning beyond minimum wage. This is because \$2.63 per hour is the lowest hourly rate that may be paid to a Service Employee. *See*, 455 CMR 2.02.
2. If the same Service Employee worked the above 20 hours during the pay period but only received \$90 in tips (rather than \$150 as above), the employer would again be responsible for paying the employee either the remaining \$70 due or \$2.63 per hour, *whichever is higher*. Since paying the employee the \$2.63 per-hour rate would result in a \$17.40 shortfall to the employee below the minimum wage threshold, the hourly rate paid to that employee for that particular pay period would actually need to be \$3.50 per hour, not \$2.63. *See*, 455 CMR 2.02.

## PAYMENT FOR ALL HOURS WORKED

In each example above, please recall that the 20 hours represents all time from when the employee arrives at the job site and punches in until he or she has punched out and finished his or her shift. In no event should any hourly paid employee (tipped Service Employee or otherwise) be allowed or required to do any work for his or her employer before he or she has started his or her shift or after it has ended. No work should ever be done “off the clock.” If you have an employee who insists on doing work before or after he or she punches in (yes, those people do exist), the employer cannot be complicit and simply sit idly by while the employee is doing so. Instead, the employer should have a

provision in the employee handbook that expressly prohibits an hourly paid employee from doing any work before or after his or her shift. If an employee is seen violating this policy, the employer should remind the employee of the policy and that he or she will be subject to discipline if he or she does not stop violating the policy. If it happens again, the employer should mete out punishment against the employee. Doing so will both serve to stop any such practice and help the employer establish that the employee was warned not to work off the clock, if that ever becomes an issue later.

## FEDERAL LAW ISSUES

While beyond the scope of this short article, readers should note that certain tipped service occupations have additional federal law requirements that they may be governed by as well. For example, in order for limousine drivers who receive tips to be paid the tipped services rate, federal law requires the driver be paid the tipped service rate to earn at least \$30 in tips per month. Additionally, the federal law tends to be very strict when it comes to defining tips. If an employer conditions a particular tip amount must be paid to the employee in advance of the service being provided, the federal law may view that as a mandatory tip, which could, in turn, be considered not to actually be a tip – since it is not discretionary and not within the exclusive purview of the person receiving the services. When this occurs, an employer may be precluded from including the mandatory tip amount when calculating whether the tipped Service Employee is actually earning over the minimum wage and it may be required to supplement the employee's wages in the manner described above in Illustration 2.

## CONCLUSION

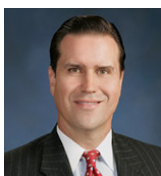
From the above article, readers are reminded that Massachusetts employers may pay employees a rate less than minimum wage only if its employees meet the requirements for being classified as Service Employees. Employers that have questions about whether their employees meet the Service Employee prerequisites or that wish to learn more about any federal regulations that may impact their Service Employees are welcome to contact the author.

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