

# Workers' Compensation Laws: Massachusetts

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A Q&A guide to workers' compensation law for employers in Massachusetts. This Q&A addresses Massachusetts laws requiring workers' compensation coverage, including the benefits process, penalties for an employer's failure to obtain workers' compensation coverage, and anti-retaliation provisions. Federal, local, or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions (see Workers' Compensation Laws: State Q&A Tool).

## OVERVIEW OF STATE WORKERS' COMPENSATION LAW

**1. Please provide a brief description of employers' obligations under your state's workers' compensation law (for example, obtaining workers' compensation coverage, posting a notice to employees). Please also:**

- Identify which employers are covered by the law and whether there are any exemptions.
- Describe any limits or restrictions placed on covered employers (for example, prohibitions on terminating employees while they are receiving workers' compensation benefits or restrictions on when covered employers can use workplace drug tests).
- Identify which employees are covered by the law and whether there are any exceptions. Are independent contractors and interns covered by the law?
- State whether the law provides for a private right of action.
- Identify the state agency or entity that administers the law.

## DESCRIPTION

Under the Massachusetts Workers' Compensation Act, all employers in Massachusetts must:

- Secure workers' compensation insurance coverage through either an insurance policy, a self-insurance group, or self-insurance (see Question 2).
- Provide notice to its employees that the employer has secured coverage either by an insurance policy, a self-insurance group, or self-insurance (M.G.L. c. 152, §§ 21 and 22).

## COVERED EMPLOYERS

All employers in Massachusetts are covered under the Act (M.G.L. c. 152, § 1(5)).

The Act:

- Allows the following employers to elect coverage:
  - a sole proprietor or partnership, to be included as an employee; and
  - employers of seasonal, casual, or part-time domestic servants. A part-time domestic servant is an individual that works for the employer less than 16 hours per week. (M.G.L. c. 152, § 1(4).)
- Excludes non-profits that are exclusively staffed by volunteers (M.G.L. c. 152, § 1(5)).

## LIMITS OR RESTRICTIONS FOR COVERED EMPLOYERS

Unless a collective bargaining agreement, individual contract of hire, or company policy provides otherwise, an employer is not prohibited from terminating an employee while receiving workers' compensation benefits and unable to work due to an occupational injury.

However, employers must:

- Give a preference in rehiring to injured employees if there is a suitable job available within the worker's capabilities (M.G.L. c. 152, § 75A).
- Provide reasonable accommodations for any disabilities if necessary, if the injured employee is deemed a qualified handicapped person (M.G.L. c. 152, § 75B).

An injured employee that has settled a workers' compensation case by lump sum settlement under M.G.L. c. 152, § 48 is presumed to be physically incapable of returning to work with the employer where the injury occurred. The presumption of physical incapacity lasts for one month for each \$1,500 amount included in the settlement for future weekly benefits. (M.G.L. c. 152, § 48(4).)

There are no restrictions in the Workers' Compensation Act on when employers can use workplace drug tests.

### COVERED EMPLOYEES

An employee is a worker "in the service of another under any contract of hire, express or implied, oral or written" (M.G.L. c. 152, § 1(4)).

Exceptions to coverage include, but are not limited to:

- Independent contractors.
- Real estate salespersons affiliated with a broker and paid only commissions.
- Certain salespersons.
- Employments in interstate or foreign commerce that are covered by federal law for compensation for injury or death.
- Taxi drivers that lease their cabs on a fee basis not related to fares collected and that are not treated as employees under federal tax law.
- Seamen on vessels engaged in interstate or foreign commerce.
- Professional athletes, if their contract pays them wages during the period of any work-related disability.
- Students working under a school-to-work program.

(M.G.L. c. 152, § 1(4).)

In addition:

- Officers or directors of corporations that own at least 25 percent interest in the corporation can elect not to be covered as an employee by filing a written waiver of compensation rights.
- A sole proprietor or a partnership may opt-in and be an employee (see Covered Employers).

(M.G.L. c. 152, § 1(4).)

### PRIVATE RIGHT OF ACTION

Workers compensation benefits are the exclusive remedy for those injured or killed on the job. Employees cannot sue their employers for damages in civil court for these work-related injuries. An employee waives a private right of action at common law or another jurisdiction's law if the employee does not give written notice to the employer that the employee claims a right of action at common law or under another jurisdiction's law either at hire or within 30 days of the time the employer obtains insurance or becomes a self-insurer. (M.G.L. c. 152, § 24.) However, an employee may sue in court if the employer does not have workers' compensation insurance (M.G.L. c. 152, §§ 66 and 67). The insured employer is deprived of any common-law defenses, such as comparative negligence, negligence of another employee, and assumption of risk.

### ADMINISTRATION

The Massachusetts Department of Industrial Accidents administers this law (M.G.L. c. 152, §§ 1(2) and 2).

## WORKERS' COMPENSATION COVERAGE

### 2. Please state whether an employer can opt out of workers' compensation coverage.

Massachusetts employers generally may not opt out of coverage. However, corporate officers or directors that own at least 25 percent interest in the corporation may opt out of coverage for themselves by filing an Affidavit of Exemption for Certain Corporate Officers or Directors (Form 153) with the Massachusetts Department of Industrial Accidents (M.G.L. c. 152, § 1(4)).

### 3. Please describe an employer's options for obtaining workers' compensation coverage. If an employer can self-insure, please describe the requirements to qualify to self-insure.

### OBTAINING WORKERS' COMPENSATION COVERAGE

To obtain workers' compensation coverage, private employers may:

- Purchase insurance from an approved commercial workers' compensation carrier, either by:
  - standard commercial coverage or target programs; or
  - an assigned risk pool governed by the Workers' Compensation Rating and Inspection Bureau of Massachusetts.
- Individually self-insure.
- Provide coverage through membership in a self-insurance group.

### REQUIREMENTS FOR SELF-INSURANCE

The Massachusetts Department of Industrial Accidents (DIA) oversees and issues self-insurance licenses to employers. Self-insurance is available for qualified employers that:

- Have been in business for at least five years with at least 300 employees.
- Have an unmodified manual premium of \$750,000 or more.
- Have not been declared insolvent or discharged from federal bankruptcy proceedings in the past five years.

(M.G.L. c. 152, § 25A(2); 452 Mass. Code Regs. 5.04; DIA: Office of Self Insurance.)

To self-insure, employers must:

- File an application to the DIA, which must include financial statements and other documents, including, but not limited to:
  - a sworn itemized statement of the employer's assets and liabilities;
  - a payroll report for the preceding fiscal year; and
  - a description of the employer's business.
- Post a bond or deposit of at least \$20,000 to cover the anticipated future liability for compensation benefit payments to be made.
- Purchase catastrophe reinsurance of at least \$500,000.

(M.G.L. c. 152, § 25A(2); 452 Mass. Code Regs. 5.02 and 5.04.)

For more information on an employer's requirements to self-insure, see DIA: Office of Self Insurance.

Although not required, many self-insurers use third-party administrators or law firms to assist with the handling of their claims.

## SELF-INSURANCE GROUP

A self-insurance group is defined as a group of five or more employers that enter into agreements to pool their liabilities for workers' compensation benefits that are either:

- Engaged in the same type of business which has been in existence for not less than two years.
- Parties to the same or related collective bargaining agreements. (M.G.L. c. 152, § 25E.)

A group seeking self-insurance must obtain approval of the self-insurance plan from the DIA. The group must:

- Submit an application, which must include, among other things:
  - information about the group (for example, the group's name, the location of its principal office, the date of organization);
  - a copy of the group's by-laws and articles of association;
  - an application from each group member; and
  - certain financial statements.
- Have combined net assets of at least \$ 1 million.
- Post a bond or security deposit to cover the anticipated future liability for compensation benefit payments to be made.
- Obtain specific and aggregate excess insurance.
- Post a fidelity bond for the administrator. (M.G.L. c. 152, § 25G.)

**4. Please identify which workplace injuries and illnesses are covered by workers' compensation. If there are key terms of art, please define them.**

## WORKPLACE INJURIES AND ILLNESSES

A Massachusetts employer must pay benefits to an employee or an employee's representative for an employee's personal injury or death arising out of and in the course of employment, including occupational diseases (M.G.L. c. 152, §§ 1(7A) and 26). There must be a causal relationship between the injury and employment for the injury to be eligible for workers' compensation benefits (*Case of Moss*, 889 N.E.2d 43, 47 (Mass. 2008)).

A disability is also within the definition of personal injury if it:

- Is a mental or emotional disability, but only if the predominant contributing cause of the disability occurs within employment. This does **not** include those arising principally out of a bona fide personnel action (for example, a transfer, promotion, demotion, or termination), unless the action was an intentional infliction of emotional distress. (M.G.L. c. 152, § 1(7A).)
- Results from a pre-existing condition that combines with a compensable injury, but only if the compensable injury is "a major but not necessarily predominant cause" of disability and need for treatment (M.G.L. c. 152, § 1(7A)).
- Results from an injury that occurred on the employer's premises, whether or not the employee was actually performing work, but generally not when the employee is travelling to and from work (*In re Kelbe's Case*, 10 N.E.3d 177 (Mass. App. Ct. 2014)).
- Is the death by suicide of the employee, but only if the employee "was of such unsoundness of mind as to make him irresponsible for his act of suicide" (M.G.L. c. 152, § 26A).

A personal injury is generally not compensable if it:

- Arises from an employee's voluntary participation in a recreational activity (for example, athletic events or parties), even if the employer pays for some or all of it (M.G.L. c. 152, § 1(7A)). However, the injury may be compensable if the employee was compelled in part by the employer to participate in the activity (see *Tigano v. Acme Boot Co.*, 8 Mass. Workers' Comp. Rep. 145, 1994 WL 199553 (Mass. Dep't Indus. Acc. May 20, 1994)).
- Is caused by the employee's "serious and willful misconduct." However, the employee's dependents can recover benefits if the employee's misconduct results in death. (M.G.L. c. 152, § 27.)
- Is horseplay, though it depends on factors including the extent and seriousness of the deviation of the conduct from the course of employment and the extent to which the practice of horseplay is accepted as part of the employment (*Kulisich v. Greater Lowell Family YMCA*, 14 Mass. Workers' Comp. Rep. 137, 140, 2000 WL 33794853 (Mass. Dep't Indus. Acc. May 23, 2000)).
- Is an injury to reputation or another intangible loss, for example, defamation, abuse of process, violation of civil rights, false imprisonment, and arrest (*Foley v. Polaroid Corp.*, 413 N.E.2d 711, 715-16 (Mass. 1980)). (M.G.L. c. 152, § 1(7A).)

An employee's intoxication in and of itself is not a bar to compensation. However, intoxication may constitute "serious and willful misconduct" and injuries caused by the intoxication is barred from compensation. (See *Dupuis v. Philip Beaulieu Home Improvement*, 19 Mass. Workers' Comp. Rep. 33, 2005 WL 641325 (Mass. Dep't Indus. Acc. March 11, 2005).)

## KEY TERMS OF ART

Under the Massachusetts Workers' Compensation Act, key terms of art include:

- **Serious and willful misconduct.** This is conduct that is "quasi-criminal in nature, the intentional doing of something either with knowledge that it is likely to result in serious injury or with wanton and reckless disregard of its probable consequences" (*Durgin's Case*, 146 N.E. 694 (Mass. 1925)).
- **Personal injury.** See Workplace Injuries and Illnesses. (M.G.L. c. 152, § 1.)

## WORKERS' COMPENSATION BENEFITS

**5. Please briefly describe the workers' compensation benefits process. Please include information on:**

- When an employee must notify the employee's employer of an injury or illness.
- When an employer must submit information about an injury or illness to its carrier or the state agency or entity.
- When a decision on compensation must be made.
- The standard of review for determinations on compensation.
- If a decision can be appealed, how a party appeals.

## BENEFITS PROCESS OVERVIEW

An injured employee must notify the employer of a workplace injury. An employer must electronically file the Employer's First Report of Injury/Fatality (Form 101) within seven days (excluding Sundays and legal holidays) from the fifth day of lost time because of injury. The employer must provide a copy of the form to:

- The injured employee.
- The Massachusetts Department of Industrial Accidents (DIA).
- The employer's workers' compensation insurance company.

After receiving the form, the insurance company has 14 days to investigate the claim and determine whether or not to pay the claim. If the insurance company denies the claim, then the employee may file a Form 110 Employee Claim with the DIA. (See DIA: Massachusetts Workers' Compensation Guide for Injured Workers.)

The Massachusetts Workers' Compensation Act defines the following terms:

- **Employee's average weekly wage.** The injured employee's earnings per week during the 12 calendar months immediately before the date of injury (M.G.L. c. 152, § 1).
- **Maximum weekly compensation rate.** 100 percent of the state average weekly wage in Massachusetts (SAWW) as calculated annually and promulgated on October 1 by the Massachusetts Executive Office of Labor and Workforce Development (M.G.L. c. 152, § 1).
- **Minimum weekly compensation rate.** 20 percent of the SAWW, as calculated annually and promulgated on October 1 by the Massachusetts Executive Office of Labor and Workforce Development (M.G.L. c. 152, § 1).

## NOTIFYING THE EMPLOYER

An employee must notify the employer "as soon as practicable" after a workplace accident. (M.G.L. c. 152, § 41). An employee or the employee's representative must file a claim within four years of the date that the employee first became aware of the causal relationship between the employee's disability and the employment or within four years of the employee's death (M.G.L. c. 152, § 41).

The notice must be in writing and must include:

- The time, place, and cause of the injury.
- The injured employee's or the employee's representative's (if the employee died) signature.

(M.G.L. c. 152, § 42.)

An injured employee's failure to provide notice may bar a claim if the lack of notice of an injury resulted in prejudice to the insurer or if the employer, insurer, or the employer or insurer's agent, had knowledge of the injury (M.G.L. c. 152, § 44).

## WHEN TO SUBMIT INFORMATION

An employer must complete and electronically file Form 101 with the DIA within seven calendar days (including Sundays and legal holidays) from the fifth day the employee is incapacitated from earning full wages because of the injury (M.G.L. c. 152, § 6). The five days of incapacitation does not have to be consecutive (*Corey's Case*, 143 N.E.2d 208 (Mass. 1957)). An employer's submission of the Form

101 does not establish liability for the injury (29 Mass. Prac., Workers' Compensation § 13.3 (3d Ed.)).

The employer must provide a copy of the form to:

- The injured employee.
- The DIA.
- The employer's workers' compensation insurance company.

An employer that fails to timely file the Form 101 three times in any 12-month period must pay a \$100 per violation. Each failure to pay a fine within 30 days after receiving the bill constitutes a separate violation. (M.G.L. c. 152, § 6.)

## WHEN A DECISION MUST BE MADE

After the employer files the Form 101, the insurer has 14 calendar days to issue either:

- Benefits to the employee as claimed and file the Insurer's Notification of Payment (Form 103).
- A denial and file the Insurer's Notification of Denial (Form 104), to the DIA, the employer and the employee by certified mail. The form must specify the grounds for denial.

(M.G.L. c. 152, § 7(1).)

If the insurer chooses, the first 180 days after the first date of incapacity is a pay-without-prejudice period where the insurer may pay benefits to the injured employee without making a final decision on the case. Payments made within this period do not establish liability. The insurer may extend the 180-day period to one year with the employee's consent and DIA approval. The insurer may also modify or stop payments within the payment without prejudice period after giving a seven calendar day notice to the employee and DIA. (M.G.L. c. 152, § 8(1); see DIA: Massachusetts Workers' Compensation Guide for Injured Workers.)

Massachusetts is a no-fault state regarding workers' compensation benefits (M.G.L. c. 152, § 66).

## STANDARD OF REVIEW

The employee must show by the preponderance of the evidence that an injury occurred arising out of and during employment and that the injury resulted in a disability which incapacitates the employee for a period of more than five days (*In re Sponatski*, 108 N.E. 466, 467 (Mass 1915)).

## APPEALING A DECISION

If an insurer issues a denial by filing a Form 104 or the insurer has not contacted the employee about a decision within 14 calendar days of the injury, the employee may file a claim with the DIA by completing and filing an Employee's Claim (Form 110) with the DIA and the insurer (452 CMR 1.07; see DIA: Massachusetts Workers' Compensation Guide for Injured Workers).

After the DIA receives the Form 110, the DIA schedules a conciliation within two weeks of receipt (452 CMR 1.08). If the parties cannot reach an agreement and the conciliator finds that there is sufficient evidence to support the employee's claim, the case is then sent to the Division of Dispute Resolution (M.G.L. c. 152, § 10).

The Division of Dispute Resolution schedules a conference, which is an informal legal proceeding, before an administrative judge within 28 days after the Division of Dispute Resolution receives the case (M.G.L. c. 152, § 10A(1); 452 CMR 1.10). The administrative judge files a written order allowing or denying benefits within seven days after the conference (M.G.L. c. 152, § 10A(2)).

A party aggrieved by a conference must file an appeal by filing an Appeal of a Conference Proceeding (Form 121) within 14 days of the date of the conference order. If the basis of the appeal is a medical issue, then the party must pay a \$650 fee and an impartial physician examination is required. If a party fails to appeal a conference order decision, the order is deemed accepted. However, a party has one year from the filing of the conference order to petition the DIA and request a hearing if the party can show mistake, accident, or other reasonable cause for the failure to appeal within the 14 days. (M.G.L. c. 152, § 10A(3); see DIA: Massachusetts Workers' Compensation Guide for Injured Workers.)

After receiving an appeal, the DIA schedules a hearing before the administrative judge assigned at the conference level. The hearing is a formal legal proceeding. (452 CMR 1.11; see DIA: Massachusetts Workers' Compensation Guide for Injured Workers.) The administrative judge must issue a decision within 28 days of the hearing (M.G.L. c. 152, §§ 11 and 11B).

A party may appeal to the Reviewing Board by filing an Appeal to Reviewing Board (Form 112) within 30 days of the filing date of the hearing decision. The filing fee is 30 percent of the average weekly wage at the time of the decision is filed. (452 CMR 1.15.) The reviewing board can reverse the decision of an administrative judge only if it determines that the administrative judge's decision is beyond the scope of the judge's authority, arbitrary or capricious, or contrary to law (M.G.L. c. 152, § 11C; see DIA: Massachusetts Workers' Compensation Guide for Injured Workers).

A party may appeal a Reviewing Board decision within 30 days to the Massachusetts Appeals Court and then to the Massachusetts Supreme Judicial Court (M.G.L. c. 30A, § 14(1); M.G.L. c. 152, § 12(2)).

#### 6. Please state whether the employer or employee has the right to choose the treating physician.

In Massachusetts, the employee has the right to choose the treating physician. However, if an employer or an insurer with employer consent has entered into a preferred provider arrangement (PPA) with medical providers, the employee must have the first scheduled appointment with a practitioner within the PPA. Previous unscheduled treatment (for example, emergency room treatment) need not be within the PPA. (M.G.L. c. 152, § 30.)

After the initial appointment, if the employer or an insurer with employer consent entered into a PPA, the employee may choose the employee's own treating physician for further care. The employee can change providers once. (M.G.L. c. 152, § 30.)

If the chosen provider refers the employee for medical treatment by a specialist, the employee may change physicians within a referred specialty once. In cases of emergency or where the insurer or administrative judge agrees, the employee may seek treatment from additional providers. (M.G.L. c. 152, § 30.)

#### 7. If an employee can be required to submit to a medical examination, please identify which party is responsible for the cost of the examination.

An insurer or employer may request that an employee submit to an examination by a registered physician after an injury and "from time to time" afterwards in Massachusetts. The insurer is not only responsible for the cost of the examination but also reasonable travel costs and lost wages incurred as a result. An employee's benefits may be suspended if he or she fails to submit to the examination. (M.G.L. c. 152, § 45.)

#### 8. Please describe the types of benefits available to injured employees. For each, please:

- State whether there is a waiting period before an employee is eligible to receive the benefit. If there is a waiting period, please identify the timeframe.
- Provide a brief description of how the benefit is calculated.

#### BENEFITS AVAILABLE TO INJURED EMPLOYEES

An injured employee in Massachusetts can recover:

- **Temporary total benefits.** This benefit is paid when the employee cannot work for five or more days (does not need to be consecutive) because of the work-related injury or illness. An employee may receive temporary total benefits for up to 156 weeks. (M.G.L. c. 152, § 34.)
- **Temporary partial benefits.** This benefit is paid when the employee loses part of the employee's earning capacity because of the work-related injury or illness, but can still work (for example, the injury requires the employee to work fewer hours or at a job that pays less). An employee may receive up to 208 weeks (260 weeks if an employee does not exhaust 156 weeks of temporary total benefits; combined, both cannot exceed 364 weeks). However, if an insurer agrees or an administrative judge finds that an employee has suffered certain circumstances of serious injuries, the employee may receive up to 520 weeks of temporary partial benefits. (M.G.L. c. 152, § 35.)
- **Permanent and total benefits.** This benefit is paid if the employee cannot work for the foreseeable future because of the work-related injury or illness. An employee may receive permanent and total benefits for as long as the employee has the disability, which may be for life. (M.G.L. c. 152, § 34A.)
- **Permanent loss of function and disfigurement benefits.** This benefit is paid if the employee's work-related injury or illness results in a permanent loss of function of certain bodily functions, scarring, disfigurement, and limbs. An employee receives a one-time payment. (M.G.L. c. 152, § 36.)
- **Survivors' or dependents' benefits.** This benefit is paid to the employee's spouse, child, or other family member that were dependent on the employee's earnings when the employee has died from a work-related injury or illness. A child may only receive benefits if the child is under the age of 18, is a full-time student under the age of 24, or cannot work because of a physical or mental disability. Benefits are subject to a maximum of the amount equal to the state average weekly wage as of the date of death times 250, including any cost of living adjustment. However,

a spouse that remarries before this maximum amount is paid forfeits his or her right to continued maximum benefits. A child's benefit may not be discontinued before the age of 18. Benefits for a surviving spouse or a mentally or physically disabled child can continue beyond the maximum "during such periods as he or she is in fact not fully self-supporting" as the reviewing board and courts have defined that phrase. (M.G.L. c. 152, §§ 31 and 32.)

- **Medical benefits.** This benefit is paid when an employee suffers a work-related injury or illness that requires medical attention. The treatment must be adequate, reasonable, and causally related to the injury or illness. An employee may receive benefits for if medical services are required because of the injury or illness except in certain circumstances of a lump sum settlement in which liability for future medical expenses may be settled and cease as of the date of settlement or as agreed in the settlement. (M.G.L. c. 152, § 30.)

(See Department of Industrial Accidents (DIA): Massachusetts Workers' Compensation Guide for Injured Workers.)

An employee may also be entitled to:

- Mileage reimbursement at the current rate of \$0.45 per mile (M.G.L. c. 152, § 45).
- Cost of living adjustment (COLA) benefits, though (for injuries after December 23, 1991) only for permanent and total benefits under M.G.L. c. 152, § 34A and death benefits under M.G.L. c. 152, § 31 (M.G.L. c. 152, § 34B).
- Burial expenses, which cannot exceed eight times the state average weekly wage (M.G.L. c. 152, § 33).

#### WAITING PERIOD AND TIMEFRAME

If the employee is incapacitated for:

- Five days or less, then no benefits are payable.
- 6 to 20 days, the employee is entitled to benefits as of the sixth day of incapacity.
- 21 days or more, the employee is entitled to benefits as of the first day of incapacity.

(M.G.L. c. 152, § 29.)

#### CALCULATION OF BENEFITS

Calculation of benefits is as follows:

- Temporary total benefits are 60 percent of an employee's average weekly wage, which cannot exceed the state maximum weekly compensation rate, but cannot be less than the minimum weekly compensation rate (M.G.L. c. 152, § 34).
- Temporary partial benefits are 60 percent of the difference between the employee's average weekly wage before the injury and the weekly wage that the employee earns or is capable of earning. However, the employee cannot receive more than 75% of the employee's temporary total benefits rate. (M.G.L. c. 152, § 35).
- Permanent and total benefits are two-thirds of an employee's average weekly wage, but cannot be:
  - more than the state maximum weekly compensation rate; or
  - less than the state minimum weekly compensation rate.
 (M.G.L. c. 152, § 34A.)

- Permanent loss of function and disfigurement benefits are calculated under the statute and the DIA's guidelines, which vary depending on the body part, though benefits based on "purely scar-based disfigurement" only apply if the disfigurement is on the hands, face, and neck. The rate at which benefits are calculated is the state average weekly wage at the time of the injury multiplied by the multipliers in M.G.L. c. 152, § 36 and the DIA guidelines, but total disfigurement benefits cannot exceed \$15,000. (M.G.L. c. 152, § 36.)
- Survivors'/dependents' benefits are two-thirds of the deceased employee's average weekly wage. The following conditions apply:
  - the surviving spouse can receive weekly benefits of two-thirds of the deceased employee's average weekly wage, up to the maximum weekly rate at the time of the employee's injury or illness, but no less than \$110 per week;
  - Surviving spouses are eligible for yearly cost of living adjustments starting two years after the date of the injury or illness;
  - if the spouse remarries, the spouse forfeits benefits, but each eligible child receives \$60 per week in benefits; and
  - a spouse or other dependent may receive \$6 per dependent if the deceased employee's compensation rate is less than \$150 per week (M.G.L. c. 152, § 35A).
- (M.G.L. c. 152, § 31; see DIA: Massachusetts Workers' Compensation Guide for Injured Workers.)
- Medical benefits are paid for treatment deemed to be adequate, reasonable, necessary, and causally related to an industrial accident. An employee may receive medical benefits for life unless the employee and insurer enter into a lump sum settlement without liability. (M.G.L. c. 152, §§ 30 and 48.)

Under the Massachusetts Workers' Compensation Act, key terms of art include:

- **Employee's average weekly wage.** The injured employee's earnings per week during the 12 calendar months immediately before the date of injury.
  - **Maximum weekly compensation rate.** 100 percent of the state average weekly wage (SAWW) in Massachusetts as calculated annually and promulgated on October 1 by the Massachusetts Executive Office of Labor and Workforce Development.
  - **Minimum weekly compensation rate.** 20 percent of the SAWW, as calculated annually and promulgated on October 1 by the Massachusetts Executive Office of Labor and Workforce Development.
- (M.G.L. c. 152, § 1.)

#### PENALTIES

**9. Please describe the possible penalties, both civil and criminal, for an employer's failure to obtain workers' compensation coverage or post a required notice.**

#### CIVIL PENALTIES

An employer that does not maintain workers' compensation insurance faces the following penalties from the Massachusetts Department of Industrial Accidents (DIA):

- A stop work order, until the employer provides evidence that it obtained workers' compensation coverage.
- A \$100 civil penalty for each day the employer does not have workers' compensation insurance.

(M.G.L. c. 152, § 25C(1).)

The DIA may increase the civil penalty to \$250 per day if the employer appeals the stop work order and the DIA finds that the employer did not comply with the insurance requirement (M.G.L. c. 152, § 25C(2)).

An employer that does not maintain workers' compensation insurance may also be barred from bidding or participating in any state or municipal funded contracts for three years (M.G.L. c. 152, § 25C(10)).

An employer that does not post the Notice to Employees poster may face a \$100 fine (see DIA: Employer's Guide to the Massachusetts Workers' Compensation System).

### CRIMINAL PENALTIES

An employer that does not maintain workers' compensation insurance is also subject to either or both:

- A fine of up to \$1,500.
- Imprisonment for up to one year.

Employers that continue to not maintain workers' compensation insurance after a conviction may face additional fines or imprisonment. (M.G.L. c. 152, § 25C(5).)

### ANTI-RETALIATION

#### 10. If your state's workers' compensation law prohibits retaliation, please include information on:

- What specific acts are protected.
- How retaliation is defined.
- What elements must be proven for an employee to prevail on a retaliation claim.
- The defenses, if any, that are available to employers.
- The statute of limitations for bringing a retaliation claim.

### PROTECTED ACTS

An employer cannot retaliate against an employee for:

- Filing a workers' compensation claim or otherwise exercising a worker's rights under the Massachusetts Workers' Compensation Act.
- Testifying or otherwise cooperating in a workers' compensation proceeding.

An employee that knowingly participates in a fraudulent workers' compensation proceeding is not protected. (M.G.L. c. 152, § 75B(2).)

### RETALIATION DEFINITION

Retaliation occurs when an employer discharges, refuses to hire, or otherwise discriminates against an employee for:

- Filing a workers' compensation claim or otherwise exercising a worker's rights under the Massachusetts Workers' Compensation Act.

- Testifying or otherwise cooperating in a workers' compensation proceeding.

(M.G.L. c. 152, § 75B(2).)

### ELEMENTS OF A RETALIATION CLAIM

To prevail on a claim for retaliatory discharge for workers' compensation benefits, the employee must show that:

- The employee engaged in an activity protected by the Massachusetts Workers' Compensation Act.
- The employer was aware that the employee participated in the protected activity.
- The employer took an adverse employment action against the employee.
- The employer would not have taken the adverse employment action but for the employee engaging in the protected activity.

(*Benoit v. Tech. Mfg. Corp.*, 331 F. 3d 166, 177 n. 5 (1st Cir. 2003), citing *Fallon v. Fed. Express Corp., Inc.*, 2002 WL 31677216, at \*6 (Mass. Super. Ct. Oct.11, 2002).)

Because the claim for retaliatory discharge is a statutory claim, an employee cannot bring a common law claim for retaliatory acts based on the employee's exercising the employee's rights under the Massachusetts Workers' Compensation Act (*Magerer v. John Sexton & Co.*, 912 F. 2d 525, 531-32 (1st Cir. 1990)).

### DEFENSE

Defenses to a claim for retaliatory discharge include the following:

- The employer did not take an adverse employment action against the employee solely because of the employee's engagement in the protected activity (see *MacCormack v. Boston Edison Co.*, 672 N.E.2d 1,7-8 (Mass. 1996)).
- The employer was not aware of the employee's engagement in the protected activity.
- The employee did not engage in the protected activity.

### STATUTE OF LIMITATIONS

Massachusetts law does not specify a statute of limitations to file a retaliation claim.

### WORKERS' COMPENSATION EXCLUSIVITY

#### 11. Please identify the types of claims that are barred by workers' compensation law. If there are exceptions, please identify them.

The Massachusetts Workers' Compensation Act is the exclusive remedy for work-related injuries or illnesses (M.G.L. c. 152, § 24). There are limited exceptions, including:

- Injuries and illnesses caused by the employee's serious and willful misconduct (M.G.L. c. 152, § 24; see Question 4).
- Injuries to the employee's reputation and similar torts (*Foley v. Polaroid Corp.*, 381 Mass. 545, 551-52 (Mass. 1980)).
- Injuries and illnesses caused by horseplay, subject to restrictive case law definitions (see Question 4).

- Dependency claims following a worker's suicide, except when "the employee was of such unsoundness of mind as to make him irresponsible for his act of suicide" (M.G.L. c. 152 § 26A; see Question 4).
- Claims involving bodily "wear and tear" resulting from activities common to a wide variety of human activities, such as not to constitute identifiable conditions of employment (*Zerofski's Case*, 433 N.E.2d 869, 871-72 (Mass. 1982)).
- Mental or emotional disabilities arising principally out of a bona fide personnel action (M.G.L. c. 152, §§ 1(7A) and 29; see Question 4).
- Purely voluntary participation in any recreational activity, even though the employer pays some or all the cost of the activity (M.G.L. c. 152, § 1(7A); see Question 4).
- Idiopathic injuries, meaning injuries caused solely by the employee's personal illness, condition, or infirmity where the workplace does not expose the employee to increased danger or contribute to the injury (*Regan v. Washington Grp. Int'l.*, 19 Mass. Workers' Comp. Rep. 303, 304, 2005 WL 3353975 (Mass. Dep't Indus. Acc. Oct. 26, 2005); *Scibilia v. J & R Schugel*, 16 Mass. Workers' Comp. Rep. 276, 290, 2002 WL 1436438 (Mass. Dep't Indus. Acc. June 25, 2002)).

## JOINT EMPLOYER LIABILITY

### 12. Please state whether your jurisdiction recognizes joint employment under workers' compensation law. If so:

- Can more than one employer receive the protection of the workers' compensation benefits bar to claims?
- If available, please briefly describe the standard to determine joint employer status.

## JOINT EMPLOYMENT

Massachusetts recognizes joint employment for workers' compensation purposes (M.G.L. c. 152, § 26B). Joint employment

applies when an employee that has concurrent employment with two or more insured employers sustains a compensable injury while performing a duty common to both insured employers. Each insurer or self-insurer pays compensation in proportion of those wages it paid in relation to the concurrent average weekly wages, which is calculated by using all gross wages from all insured employers. (M.G.L. c. 152, §§ 1 and 26B.)

Massachusetts law also addresses situations when an insured employer contracts with another contractor or sub-contractor. If an employee sustains a compensable injury while working for a contractor or sub-contractor that does not maintain insurance, the employee may obtain workers' compensation benefits from the other insured employer that contracted with the uninsured entity. (M.G.L. c. 152, § 18.) This typically arises in construction type work.

## PROTECTION FOR MULTIPLE EMPLOYERS

See Joint Employment.

## STANDARD FOR JOINT EMPLOYER STATUS

See Joint Employment.

## ADDITIONAL RESOURCES

### 13. If the state agency charged with oversight of the workers' compensation law in your state has useful online guidance or forms, please provide the link for those resources and a brief description of them.

The Massachusetts Department of Industrial Accidents provides useful guidance on Massachusetts workers' compensation law on its website.

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