

MASSACHUSETTS RETAILERS: JUNETEENTH PREMIUM PAY OBLIGATIONS BEGIN THIS YEAR

Insights
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Last summer, as part of a COVID-19-related spending bill, the Massachusetts legislature added Juneteenth Independence Day (June 19) to the list of premium pay holidays in the Commonwealth's "Blue Laws." Juneteenth now joins New Year's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, and Veterans Day as holidays where retail employers must pay a premium hourly rate to non-exempt employees (until the obligation phases out on January 1, 2023) and cannot require employees to work. What do Massachusetts employers need to know about this latest obligation and the Blue Laws generally?

What is Juneteenth Independence Day?

Juneteenth Independence Day commemorates the reading of President Lincoln's Emancipation Proclamation by Union General Gordon Granger in Galveston, Texas on June 19, 1865, two months after the Confederacy's surrender ended the Civil War. Over the years, the holiday has spread from Texas throughout the country as an annual celebration of freedom from slavery and of African American culture. Forty-six states and the District of Columbia recognize Juneteenth as a state holiday or day of recognition.

What are the Blue Laws?

Dating back to the state's Puritan founding, Massachusetts has long outlawed "any manner of labor, business or work" on Sundays and certain holidays. Rather than repeal this law, the legislature has added 56 exemptions covering nearly all forms of business and industry over the past four centuries.

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While most of the exemptions simply permit a business to operate on Sundays or holidays, a few add other obligations for certain types of employers.

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Specifically, the following employers must pay their non-exempt employees a premium rate for work on Sundays and the seven holidays listed above if they:

- are a “store or shop” open for the “sale of retail goods” that employs more than seven people; or
- sell tobacco products, soft drinks, confectioneries, baby foods, fresh fruit fresh vegetables, dairy products and eggs, or poultry raised by the seller; or
- sell drugs, medicine, medical devices, personal health or sanitary supplies; or
- sell alcoholic beverages.

What are a Retail Employer’s Obligations on Sundays and Blue Laws Holidays?

A retail employer’s obligations under the Blue Laws fall into three categories: whether the business may legally open; the premium pay rate owed to employees who work on Sundays/holidays; and whether an employer can require work on Sundays/holidays.

Can We Open?

The Blue Laws are “closure laws” requiring businesses to be closed unless exempted. A few exemptions permit retailers to open any time on a Sunday and most holidays. However, retailers wishing to open prior to 12:00pm on Columbus Day, prior to 1:00 pm on Veterans Day, Thanksgiving, or Christmas need to ensure that both a state-wide permit for such opening has been granted by the Department of Labor Standards, and that the retailer has obtained a permit from the local chief of police.

What is the Premium Pay Rate?

As of January 2021, non-exempt retail employees must be paid at least 1.2x their regular rate for any time worked on Sundays, New Year’s Day, Memorial Day, Juneteenth Independence Day, Independence Day, Labor Day, Columbus Day, and Veterans Day. Due to recent changes in Massachusetts law as a result of the “[Grand Bargain](#)” in

2018, the premium pay multiplier has decreased by 0.1x each year since 2019. In 2022, retail employers will be obligated to pay 1.1x the regular rate, and the premium pay obligation will be completely eliminated in 2023.

Can Retailers Mandate Work on Sundays or Holidays?

No. Work on Sundays/holidays must be voluntary and an employer cannot take an adverse action against an employee who refuses to work on Sundays/holidays. While there is little guidance about whether an employee who normally works Sundays can call out on a specific Sunday (versus stating upon hire that they are unavailable on all Sundays), employers are advised to be upfront about Sunday/holiday work expectations during the hiring process to avoid unnecessary confusion down the road. Likewise, an employer may not treat an employee negatively because of their unwillingness to work Sundays/holidays. This includes any discrimination, dismissal, discharge, reduction in hours, or any other penalty. Importantly, the voluntariness of work requirements will not expire when the premium pay obligations sunset in 2023.

What Else Should Employers Consider?

The Massachusetts Blue Laws are an intertwined hodgepodge of statutory obligations that are both overlapping and contradictory. The lack of clarity and dearth of relevant guidance from enforcement agencies places employers at peril and leads to considerable confusion. A few issues frequently raised by retail employers are discussed below.

My business is authorized to open by an exemption other than the “retail store” exemptions, do the premium pay requirements apply to me?

There are presently 56 exemptions to the Sunday closure law. Only the exemptions in paragraphs 25, 27, 50, and 52 of § 6 of the statute require premium pay. If your entire operation fits into one of the other 52 exemptions, your employees may not be entitled to premium pay on Sundays or some of the Blue Law holidays (Memorial Day, Juneteenth, Independence Day, or Labor Day) because the premium pay obligations for those holidays specifically incorporate the Sunday pay law by reference.

However, the authority to open on three other holidays (New Year's Day, Columbus Day, or Veterans Day) is derived from a separate statute that does not rely on the Sunday pay law. Instead, it requires premium pay to employees of any "retail establishment." Massachusetts courts have concluded this statute compels payment of premium pay even if the employer is otherwise exempt from the Sunday pay law, with one court calling this conclusion a "somewhat odd result." These courts have concluded that the use of the term "retail establishment" was meant to apply to a much broader swath of business operations and does not require reference to the Sunday pay law. If any of your operations involves retail, you need to consider whether you are required to pay premium pay on New Year's Day, Columbus Day, or Veterans Day, even if otherwise exempt from the Sunday pay law.

What happens when a holiday falls on a weekend?

Under Massachusetts law, when a holiday falls on a Saturday, it is observed on the Saturday. Sunday holidays, however, are observed on the following Monday. This means that in certain holiday weeks, employers may be on the hook for Sunday pay and holiday pay, despite the holiday being on a Sunday. For example, Independence Day (July 4) falls on a Sunday in 2021. Therefore, any employees working the following Monday (July 5) are entitled to premium pay for both July 4 (under the Sunday pay law) and July 5 (under the holiday pay law).

How do Sunday/holiday premium payments interact with overtime and the calculation of an employee's regular rate?

Prior to 2019, the answer to this question was simple. Sunday and holiday payments were not considered in determining an employee's regular rate under either Massachusetts or federal law, as both exclude payments for Sunday/holidays if such payments are at least 1.5x the employee's regular rate. However, neither Massachusetts nor federal law permits an employer to exclude premium payments from the regular rate calculation when they are less than 1.5x the regular rate. If an employer attempts to avail itself of the reduced premium pay rate for Sundays/holidays, it must carefully consider the impact of those payments if its employees also work overtime.

The following examples illustrate how the reduced premium rates factor into determining the overtime rate, using the

current minimum wage of \$13.50/hour.

1. Employee works 30 hours between Monday and Saturday and 8 hours on Sunday

- Employee is owed 30 hours at minimum wage plus 8 hours of Sunday premium pay at 1.2x their regular rate: $(30 \times \$13.50 = \$405) + (8 \times \$16.20 = \$129.60) = \$534.60$.

2. Employee works 35 hours between Monday and Saturday and 10 hours on Sunday

- Employee is owed 35.0 hours at minimum wage, plus 5 hours of Sunday premium pay at 1.2x her regular rate, plus 5 hours of overtime at 1.5x their regular rate.
- The regular rate, however, must include both the straight time rate and the Sunday premium rate. In this scenario the regular rate is calculated as follows: $((35 \times \$13.50) + (5 \times \$16.20)) \div 40$. This employee's regular rate is therefore \$13.83, and all overtime hours need to be paid at 1.5x this rate, or \$20.75.
- This employee's total pay is calculated as: $(35 \times \$13.50 = \$472.50) + (5 \times \$16.20 = \$81) + (5 \times \$20.75 = \$103.78) = \$657.28$.

3. Employee works 40 hours between Monday and Saturday and 8.0 hours on Sunday

- Employee is owed 40.0 hours at minimum wage plus 8 hours of overtime at 1.5x their regular rate: $(40 \times \$13.50 = \$540) + (8 \times \$20.25 = 162) = \702

As the last two examples demonstrate, when an employee works more than 40 hours and on a Sunday/holiday in the same workweek, employers must be careful in calculating the regular rate. In Example 3, the calculation is simple — when all Sunday/holiday hours are also overtime hours, the employer must pay the higher rate of 1.5x for all hours. When some of the Sunday/holiday hours are not also overtime, the math gets complicated. To avoid this, many employers have continued paying 1.5x for all holidays, despite the lower rate provided by statute.

Stay Tuned For More

The Blue Laws present significant compliance challenges for Massachusetts employers. We will continue to monitor further developments and provide updates on this and other labor and employment issues affecting Massachusetts employers, so make sure you are subscribed to [Fisher Phillips' Insight system](#) to gather the most up-to-date information.

If you have questions, please contact your Fisher Phillips attorney, the [author](#) of this alert, or any attorney in our [Boston](#) office.