

**Paying Minimum Wage and Overtime Correctly for 2020**

Presented for the  
**New England Vegetable and Berry Growers Association**

Presented by  
**John S. Gannon, Esq.**

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One Monarch Place, Suite 2000, Springfield, MA 01144 | (413) 737-4753  
Worcester, MA | (508) 757-5336  
Waterbury, CT | (203) 630-1195

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**John S. Gannon**

John S. Gannon has defended employers against claims of discrimination, retaliation, harassment, and wrongful termination, as well as actions arising under the FMLA and wage and hour law. John also has experience with lawsuits seeking to enforce restrictive covenants and protect trade secrets. John frequently assists employers in litigation avoidance strategies. He regularly counsels employers on compliance with state and federal laws, including the Americans with Disabilities Act, Fair Labor Standards Act, and Occupational Health and Safety Act. John is a regular contributor to business publications and to the Massachusetts Employment Law Letter.

 **E-Mail**  
 jgannon@skoler-abbott.com  
<https://www.linkedin.com/in/johngannonesq>  
<https://www.skoler-abbott.com/attorneys/john-s-gannon/>

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**Common Wage/Hour Mistakes**

- Not paying for all hours worked
  - *E.g.*, travel, training, etc.
- Not paying/miscalculating overtime and minimum wage obligations
- Not paying for time worked during meal breaks
  - If unpaid, employees must be fully relieved of duties
- Treating employees as independent contractors
  - Many states have their own independent contractor laws
  - Employee status is presumed under MA law

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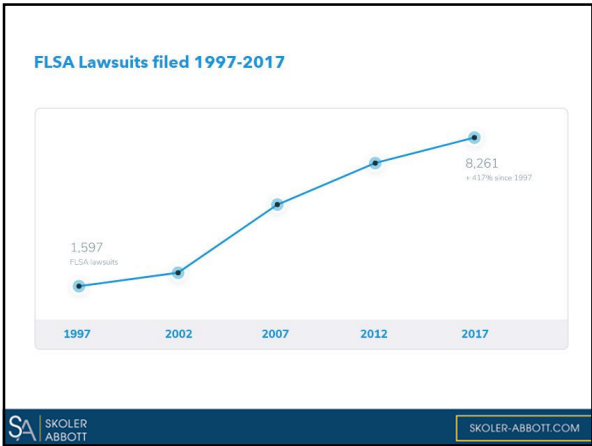
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**Reasons for Increased Activity**

- Fee shifting for successful claims
- Employee awareness
- Heightened DOL enforcement
- Mistakes happen
  - Not an excuse
  - No intent component
- Collective actions present significant liability
- In 2010, the average settlement in the top 10 reported wage and hour class action filings was \$34 million

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**Basic Wage/Hour Principles**

- Fair Labor Standards Act (FLSA)
  - Federal statute that regulates wage and hour law
- FLSA requires payment of the federal minimum wage (\$7.25), and guarantees compensation for all time worked, including overtime at time-and-a-half for all hours over 40 in a workweek
- States often have own wage and hour laws
  - Ex: MA Wage Act
    - Similar to FLSA, but MA minimum wage is \$12.75/hour as of Jan. 1, 2020
    - Agricultural or farm workers minimum wage of \$8.00/hour

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## Recordkeeping

- Must keep certain records for each non-exempt worker:
  - Employee's full name and social security number;
  - Address, including zip code;
  - Birth date, if younger than 19;
  - Time and day of week when employee's workweek begins;
  - Hours worked each day and total hours worked each workweek;
  - Regular hourly pay rate;
  - Total weekly straight-time earnings;
  - Total overtime earnings for the workweek;
  - All additions to or deductions from the employee's wages;
  - Total wages paid each pay period; and
  - Date of payment and the pay period covered by the payment.

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## Meals & Rest Periods

- Employees must be paid for all breaks of less than 20 minutes
- Employees need not be paid for breaks that are 20 minutes or longer if no work is performed
  - Must be completely relieved of duties
  - No restrictions placed on their activities
- State laws may require meal breaks
  - Ex: MA requires break when employee works 6 hours
  - Break waivers may be permissible if time is paid

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## Overtime

- Must pay 1.5 x regular rate when working > 40 hours in a workweek
- Regular rate = total compensation/hours worked in the workweek
- Example: Employee with hourly rate of \$12/hour earns weekly bonus of \$150, works 45 hours in the workweek
- Regular rate =  $\$12 \times 45 (540) + 150 (\$690) / 45$  hours worked
  - \$15.33/hour = regular rate

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## Overtime

- Exception under FLSA: Employee who is employed “as a laborer engaged in agriculture and farming on a farm” (primary agriculture)
  - Included in the primary meaning are certain specific farming operations such as cultivation and tillage of the soil, dairying the production, cultivation, growing and harvesting of any agricultural or horticultural commodities, and the raising of livestock, bees, fur-bearing animals, or poultry

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## Overtime

- Secondary agriculture:
  - Includes work performed on a farm that is incidental to or in conjunction with farming operation
    - preparation for market, delivery to storage or to market or to carriers for transportation to market
    - does not include operations performed off a farm if performed by employees employed by someone other than the farmer whose agricultural products are being worked on

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## Overtime

- Activity is generally “incident to or in conjunction with such farming operations,” and thus secondary agriculture, only if:
  1. is more akin to agriculture than manufacturing,
  2. is subordinate to the farming operations involved, and
  3. does not amount to an independent business.

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## Overtime

- Generally are NOT exempt from overtime under FLSA
  - Working in agritourism (e.g., on-farm festivals, hay rides, corn mazes)
  - Handling produce grown off-farm (e.g., stocking raspberries grown by a neighbor)
  - Processing farm products, especially when off-farm ingredients are added or composition is altered
  - Installing farm-grown landscaping plants for customers

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## Overtime

- Employees not directly involved in growing/harvesting?
  - Includes employees who clean, inspect, weigh, and package the food, as well as those who clean the farm and transport the food to market
  - Commonly referred to as post-harvesting
  - Generally exempt from OT under FLSA: preparation for market
  - **But what about state law?**

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## Arias-Villano v. Chang & Sons Enterprises, Inc.

- Employees cleaned, inspected, sorted, weighed, and packaged the bean sprouts
- Brought class action claiming due unpaid overtime (under MA state law)
- EEs claimed agricultural exemption not applicable, not “engaged in agriculture and farming on a farm”
- Employer: this work is incidental to farming operations
  - Exempt under FLSA

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## Arias-Villano v. Chang & Sons Enterprises, Inc.

- MA Supreme Judicial Court: No; agreed with plaintiffs/employees
  - Massachusetts law does not have the incident to/conjunction with language found in FLSA
  - MA law defines “agricultural and farm work” as “labor on a farm and the growing and harvesting of agricultural, floricultural and horticultural commodities”
  - MA law does not exempt post-harvesting activities
  - Exemption limited to “planting, raising, and harvesting crops”
    - What about operations not involving crops?
    - Suggestion: Go back to FLSA primary/secondary test
    - If fails primary test, likely non-exempt from OT

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## Tips for Dealing with Unauthorized Overtime

- Have a clear, consistently enforced policy prohibiting unauthorized overtime
- Supervisors should closely monitor employees’ hours and enforce overtime policy
- Have a disciplinary procedure to address unauthorized overtime, and apply it consistently
- **Do not refuse to pay overtime, even when unauthorized**

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## Questions?



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