

**Summary of Testimony: Regulation 454 CMR 27.00 and repeal of 455 CMR 2.00  
Minimum Wage Regulations**

**Notes:**

- Dates of Public Hearings: 12/29/14 (Boston), 12/30/14 (Springfield)
- Comment period closed 12/30/14
- >58 written comments received during comment period
- 50 hearing attendees

<b><u>COMMENTS</u></b>	<b><u>DISCUSSION</u></b>	<b><u>CHANGE TO PROPOSAL</u></b>
<p>The Legislature intended to provide a full minimum wage exemption for seasonal camp counselors and counselor trainees. In drafting and enacting this provision, the Legislature explicitly recognized that existing Massachusetts law did not reflect the unique nature of the camping industry.</p>	<p>The legislature added “seasonal camp counselors” to the section of the Minimum Fair Wages Act that authorizes the Commissioner to establish a sub-minimum wage for various types of jobs, M.G.L. c. 151 §7. The current regulation has permitted seasonal camps to pay student camp counselors and counselor trainees 80% of minimum wage for years. The DLS Director has set a wage of 80% of minimum wage for other types of jobs, but has never authorized a complete exemption from a minimum fair wage under the authority of G.L. c. 151 §7. By contrast, §2 of the law specifically excludes certain types of work from the definition of “occupation” under the law, thereby exempting that work from the minimum wage. The DLS has received numerous comments from interested parties and legislators that the intent of the legislature was to provide a full minimum wage exemption to seasonal camp counselors and trainees. As a result of the comments, the language of the proposed regulation setting a wage of 80% of minimum wage for seasonal camp counselors and trainees will be deleted. The DLS will issue an opinion letter reflecting the legislative intent of the statutory language.</p>	<p>Proposed 27.06(2) <u>Camp Counselors</u> is deleted in its entirety.</p>

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<p>We request that you allow for the dialogue around this particular discrepancy to continue in to the New Year and not amend the regulations as they pertain to seasonal camp counselors and counselor trainees before the new year.</p>	<p>Based upon feedback received from regulated parties and the general public during the comment period, the DLS believes it can address all of the concerns raised and intends to proceed with its timetable of promulgating these amendments within the coming month.</p>	<p>None needed.</p>
<p>The minimum wage regulations have needed, for some time, to be updated and clarified to reflect the evolution of the law, and we therefore believe that it is very important the amended regulations be finalized promptly and without further delay.</p>	<p>Based upon feedback received from regulated parties and the general public during the comment period, the DLS believes it can address all of the concerns raised and intends to proceed with its timetable of promulgating these amendments within the coming month.</p>	<p>None needed.</p>
<p>For years now, camps have used the safe harbor provision of the regulations (section 27.03(3)(c)), allowing them to make reasonable agreements as to hours worked with counselors taking into consideration all pertinent facts. In these proposed regulations, this safe harbor has been eliminated through addition of language that removes all ambiguity.</p>	<p>The reference to changes that impact section 27.03(3)(c) is not clear. The right to make a reasonable agreement regarding working time when an employee resides on the premises has not been changed except to require a <i>written</i> agreement. The agreement may address unpaid sleeping and meal times. The additional language stating that all time worked and on-call time must be compensated simply makes explicit current obligations under the law. This is not a new requirement. An employee may not be required to work without pay. An employee may not be on-call, as described in the regulation, and have sleep interrupted in order to perform work duties, and not get paid.</p>	<p>None.</p>

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<p>The proposed regulations go even further in the wrong direction, by eliminating the ability for camps to deduct from wages, meal and lodging costs for their counselors.</p>	<p>The exemption of seasonal camp counselors and trainees from the minimum wage and overtime provisions of the law as discussed above should alleviate any issues for camps regarding deductions for meals and lodging. The overriding public policy goal and language of the Minimum Fair Wages law to guarantee a fair and reasonable wage supports the determination that deductions for meals and lodging are only permitted if the worker earns at least the basic minimum wage.</p>	<p>None.</p>
<p>The vast majority of states mirror the Fair Labor Standards Act in providing a full exemption from the minimum wage and overtime provisions of the FLSA for all camp staff employed on a seasonal basis.</p>	<p>The DLS recognizes that the Fair Labor Standards Act (FLSA) provides for an exemption to minimum wage for seasonal businesses. This is not disputed. However, Massachusetts has its own Minimum Fair Wage Act and regulations which do not entirely mirror FLSA, not just in this regard but in others. For example, Massachusetts has a higher minimum wage than that provided for in FLSA, and a business may be seasonal in nature if operates for 120-days or fewer in a year under MA law, not 7-months as under the FLSA</p>	<p>None needed.</p>

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<p>Under the proposed regulatory scheme, a 15-year old residential camp counselor trainee would make the equivalent of an annualized salary of \$30,000 in 2015, \$33,280 in 2016, and \$36,608 in 2017 plus room and board.</p>	<p>As stated above, the 80% minimum wage rate for seasonal camp counselors and counselor trainees is removed from the regulation. As a point of curiosity, the DLS is not certain of the basis for these annualized calculations. Under the child labor laws, a 15-year old is able to work up to 40-hours per week. At 80% of the minimum wage of \$9.00/hour (\$7.20), a 15-year old or any adult camp counselor working 40-hours per week would earn a maximum \$288.00 per week. For a 50-week year, that would equal a salary of \$14,400 in 2015; \$16,000 in 2016; and \$17,600 in 2017. In order to earn an annual salary of \$30,000, an employee would have to earn \$600 per week. At \$7.20/hour, that would be an 83-hour work-week every week for 50-weeks.</p>	<p>None needed.</p>
<p>We request that the definition of “seasonal camp counselor” include lifeguards. In many camps a lifeguard has direct supervision of campers and is often a camp counselor as well as a lifeguard.</p>	<p>The DLS will issue an opinion letter addressing the minimum wage for seasonal camp counselors. See above.</p>	<p>See above.</p>
<p>We are concerned with the proposed change that deductions for room and board be applicable to only employees paid at minimum wage, and ask that an employer be allowed to deduct for room and board regardless of pay rate.</p>	<p>The overriding public policy goal and language of the Minimum Fair Wages law to guarantee a fair and reasonable wage supports the determination that deductions for meals and lodging are only permitted if the worker earns at least the basic minimum wage.</p>	<p>None.</p>

<u>COMMENTS</u>	<u>DISCUSSION</u>	<u>CHANGE TO PROPOSAL</u>
<p>We request that in the section titled, “Wage Payments and Deductions from Wages,” the sentence that reads, “A deduction for meals is not permitted unless the employee voluntarily accepts and actually receives the meal” be revised to read, “unless the employee voluntarily accepts the meal and the meal is provided for them.” The paperwork required to determine if an employee actually ate a meal that was provided for them is excessive and will create an even greater administrative burden on camps.</p>	<p>The regulation does not say that the employee must consume the meal, but rather that the employee must receive the meal. The language indicates that the employee must be in the position actually to receive the meal. It is not sufficient for the meal to be generally available if the employee is not in a position to get it. The requirement of a written agreement for the meal plan, cost, and voluntariness in order to deduct money from an employee’s pay is reasonable.</p>	<p>No change to regulation</p>
<p>We think employers should be given 10 business days to produce 3 years of payroll records to an employee, not 5.</p>	<p>Concerns from the employer community regarding time needed to review and redact payrolls are reasonable. The DLS will make the requested change to the regulation.</p>	<p>Proposed CMR 27.07(2) will be amended to read: “An employee who requests such records as they pertain to himself or herself shall be provided with a copy within ten business days..”</p>

<u>COMMENTS</u>	<u>DISCUSSION</u>	<u>CHANGE TO PROPOSAL</u>
<p>We ask that you reexamine the requirement to keep an accurate record of sick time for employers that offer paid time off that is more generous than the Massachusetts sick leave law.</p>	<p>As the commenter rightly points out, the new Massachusetts sick leave law at G.L. c. 149, section 148(C)(k) states: “Employers required to provide earned paid sick time who provide their employees paid time off, vacation or other paid leave policy who make available an amount of paid time off sufficient to meet the accrual requirements of this section that may be used for the same purposes and under the same conditions as earned paid sick time under this section are not required by this section to provide additional earned paid sick time.” Whether an employer provides sick leave under an existing benefit or whether an employer will be subject to provide sick leave in accordance with Massachusetts’ new sick leave law, employers will likely need to maintain records in order to be in compliance with the law. However, given the concerns raised by employers that it is premature to amend the Minimum Wage regulations in light of the fact that regulations for the sick leave law have yet to be issued, DLS will remove this requirement from the proposed regulation.</p>	<p>In 27.07(2) <u>Records</u>, delete “and sick time earned or available to the employee”</p>
<p>We are concerned that the revised definition of employer is too broad and suggest considering adding in, “for wages, remuneration, or other compensation,” to the definition of “employ.”</p>	<p>In response to concerns about an overly-broad definition, language is restored to the definition of “employer” rather than adding it to the definition of “employ”</p>	<p>Amend definition of <u>Employer</u>: “An individual, corporation, partnership or other entity, including any agent thereof, that employs an employee or employees for wages, remuneration or other compensation.</p>

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<p>I wish to respond to the suggestion that was raised at the hearing that the definition of “employ” should have added language reading, “for wages, remuneration or other compensation” or “with reasonable expectation of receiving wages, remuneration or other compensation” because of a concern about ensuring that individuals can volunteer for non-profits without being covered by the minimum wage law. The proposed language recommended by the commenter is problematic because it would allow for-profit businesses to have “volunteer” workers.</p>	<p>See above. Language will be restored to the definition of “employer.” Standards are in place regarding lawful “volunteers.”</p>	
<p>We wondered if at 27.05(3), in the last sentence, that the word “lodging” should be changed to “meals.”</p>	<p>DLS thanks the commenter for highlighting this typographical error and will make the needed change to the regulation.</p>	<p>27.05(3), first paragraph, last sentence, “lodging” is changed to “meals”</p>
<p>Our members seek clarification on Hours Worked under section 27.04. It is noted that the employer and the employee may agree in writing to exclude meal periods and a sleeping period of not more than eight hours. It is unclear, however, if those meal periods are in addition to the eight hours of sleeping time. If a home care worker is in a home for a 24-hour period, it could be clearly defined outside of any written agreements pertaining to what time for meals and sleeping is counted and compensable.</p>	<p>Meal periods are separate from sleeping time. The “not more than eight hours” refers to sleeping time.</p>	<p>No change to regulation</p>

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<p>We would also appreciate clarification of a reasonable length of those meal periods and whether they are permissible even though the worker is required to remain at the worksite during the meal break.</p>	<p>A meal period is <i>bona fide</i> if the employee is completely relieved from duty and is able to leave the premises. The DLS will respond to inquiries regarding particular circumstances where the employee is unable to leave the worksite for reasons outside the employer’s control. If the employee is able to eat a meal but is not relieved from duty, the time must be paid.</p>	<p>No change to regulation</p>
<p>We have concerns relative to section 27.07 relative to Notice and Recordkeeping. The discussion about posting a notice in the primary language of a cohort of any 5% or more of the employers workforce raises a question: How do employers discover employees’ primary languages? This appears to violate the rules of the MA Commission Against Discrimination, and moreover, an employee may have the right to refuse to answer. Please clarify.</p>	<p>In response to comments from employer’s, the section is modified to require the translated notice if the language is commonly spoken among employees at the worksite. The requirement is not overly burdensome for employers since notices in different languages are only required if the translation is available from the Commonwealth.</p>	<p>27.07 is amended: The workplace notice shall be posted in English, and in any other language that is commonly spoken by five percent (5%) or more of the employer’s workforce and for which a translated notice in that language is available from the Commonwealth.</p>
<p>We are deeply concerned about the current draft of Section 27.06(3) which addresses special certificates that authorize subminimum wages for persons with disabilities. In so doing, it maintains the existing system of permitting such exemptions and introduces no new substantive protections for workers subjected to such very low wage levels. DLS should issue regulations providing that it will not issue new state special certificates in the future and will closely oversee existing certificates until they expire.</p>	<p>DLS recognizes that it has had several discussions with parties with opposing views of the legally permissible sub-minimum wage waiver for persons with disabilities. DLS further believes that this is a significant public policy issue that bears further discussion. For the purposes of these amended regulations, DLS has not addressed these special certificates other than to make explicit what the department requires for employers seeking a certificate.</p>	<p>None.</p>

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<p>In November of 2013, the MA Department of Developmental Services (DDS) issued the policy statement, “Blueprint for Success: Employing Individuals with Intellectual Disabilities in Massachusetts.” The Blueprint established a policy of providing no new placements in sheltered workshops after January 1, 2014, and phasing out sheltered workshops by June 30, 2015. It also established competitive integrated employment as the preferential outcome and set forth a policy objective of phasing out group employment at less than minimum wage. The existing regulations are misaligned both with current thinking and best practices in the field, and with state policy directives, all aimed at phasing out sheltered workshops and other subminimum wage group employment.</p>	<p>DLS is familiar with this document and has read with interest the timelines and goals of this Blueprint. Given the fact that the stated goals within the Blueprint have a correlation with the Minimum Wage Law and regulations, DLS is committed to meeting with Executive Office of Labor and Workforce officials, as well as Executive Office of Health and Human Services officials in the coming year to discuss alignment of state policy in this regard.</p>	<p>None.</p>

<u>COMMENTS</u>	<u>DISCUSSION</u>	<u>CHANGE TO PROPOSAL</u>
<p>We recommend that the DLS use a sunset date of January 1, 2015, or the date of issuance of final regulations, and permit subminimum wages only for those employers with previously approved state special certificates granted before this date. Those employers who have a certificate granted before this cut-off should be monitored to ensure they are complying with the terms of their state certificates...it will be especially important to ensure that the employers are updating prevailing wage surveys to maintain pace with increases in the state minimum wage effective January 1, 2015.</p>	<p>Due to the fact that M.G.L. c. 151, §9 does not compel the DLS to issue special certificates for subminimum wage, the department believes that changes to this program can be made outside of the regulatory process as a matter of policy. After engaging in robust discussion with all parties involved in this issue as discussed above, should DLS seek to change its policy, it can do so through interpretive opinion letter and policy guidance to affected parties.</p> <p>With regard to the comment about employers with existing waivers needing to update prevailing wage surveys to maintain pace with increases to the minimum wage on January 1, 2015, please know that DLS currently requires employers requesting a certificate to cover a period after January 1, 2015, to provide documentation that wages will be paid in accordance with the increased minimum wage. DLS has sent notice to all holders of certificates that compliance with increases in the minimum wage is mandatory.</p>	<p>None.</p>
<p>If DLS were to set a sunset date some time into the future, we recommend that any certificate granted before this date be based upon (i) informed consent of these employees to opt for segregated work over a more integrated setting; (ii) an objective determination that the employee is unable to engage in many types of competitive integrated employment; and (iii) a requirement that the employer pay no less than 80% of the state minimum wage for every hour of labor done by a person with a disability.</p>	<p>DLS believes the commenter has made worthwhile policy considerations and will incorporate said suggestions into discussions as noted above.</p>	<p>None.</p>

<u>COMMENTS</u>	<u>DISCUSSION</u>	<u>CHANGE TO PROPOSAL</u>
<p>We urge the department not to enact its proposed revision of 454 CMR 27.03, which would prohibit the use of the “fluctuating workweek” method of overtime calculation. This proposed regulatory change would harm employees by prohibiting one of the most commonly used methods to fulfill non-exempt employees’ desire for consistent pay from week-to-week. In addition, the change would be highly burdensome to Massachusetts employers, requiring fundamental changes to the manner in which many employers currently calculate overtime.</p>	<p>The DLS has no intention to prohibit use of the fluctuating workweek through the regulation. Language has been amended to make clear that this method of determining overtime is not restricted.</p>	<p>Amend 27.03(3), by adding to end of second paragraph: , except that this limitation only applies to the “one half” portion of the overtime rate (one and “one half” times an employee’s regular hourly rate) when overtime is determined on a <i>bona fide</i> fluctuating workweek basis.</p>
<p>We are concerned about the removal of the uniform deposit waiver and ask that it is restored. For certain industries, it is a significant financial impact to replace jackets that seasonal employees may keep.</p>	<p>Based on feedback from the regulated community that removing this existing allowance will cause significant financial harm to certain businesses, and since a worker is fully refunded his/her deposit upon the return of the uniform, the department will retain the language in the current regulation.</p>	<p>27.05(4)(b): No deposit shall be required by the employer from an employee for a uniform, except by permission of the Director.</p>