THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF OCCUPATIONAL SAFETY
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JANE SWIFT
GOVERNOR

ANGELO R. BUONOPANE
DIRECTOR

ROBERT J. PREZIOSO
DEPUTY DIRECTOR

August 28, 2001

David J. Hopwood, Esq.
27 Sabbatt Road
Post Office Box 3918
Pocasset, MA 02559

Re: PW Opinion 2001
401K Plan Deductions

Dear Mr. Hopwood:

The Division of Occupational Safety ("DOS") which administers the Massachusetts Prevailing Wage Law is in receipt of your letter to Mr. Greg Reutlinger of the Attorney General's Office, dated May 18. In that letter you ask whether an employer's matching contributions to an employee's 401K plan are deductible for purposes of computing the rate of pay as calculated under the Prevailing Wage Law, and, if so, whether this is true for both matching and discretionary contributions. You also ask whether DOS would use the IRS's "last year model" method of making that calculation. Lastly, you ask whether the associated costs to the employer of administering those is deductible from the prevailing wage of the employee or would that be considered the simply the cost of doing business and not deductible. We shall respond to each of these questions.

Deferred compensation plans, known as 401K Plans, are generally regarded as part of an employee's wages. See, for example, G.L. c. 151A, §1, the Unemployment Benefits Statute states under its definition of wages:

> (B) The term "wages" shall include: (i) *any employer contribution under a qualified cash or deferred arrangement as defined in section 401K of the Federal Internal Revenue Code*, to the extent not included in gross income by reason of section 402 (1) (8) of the Code; (ii) any amount treated as an employer

> contribution under section 414 (h) (2) of the Code; and (iii) any employer contribution under a nonqualified deferred compensation plan. For the purposes of clause (iii) the term nonqualified deferred compensation plan shall mean any plan or other arrangement for deferral of compensation other than a plan described in subparagraph (3) of paragraph (A). Any amount deferred under a nonqualified deferred compensation plan shall be taken into account for purposes of this paragraph as of the date that the services are performed or the date that there is no substantial risk of forfeiture of the rights to such amount, whichever date is later.

G.L. c. 151A, §1. (Emphasis added). Thus, contributions by the employer to employees' 401k plans would be regarded as payments to "pension plans" under the Prevailing Wage Statute, G.L. c. 149, §§26 and 27, and may be deducted from the "total rate" listed on prevailing wage schedules.

However, (in answer to your last question) the administrative costs of providing 401k or other pension plans for the benefit of employees would not be considered part of the employees' wages for purposes of the Statute. Section 26 of G.L. c. 149 states that "payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans under collective bargaining agreements or understandings between organized labor and employers shall be included for the purpose of establishing minimum wage rates as herein provided." All other deductions, including but not limited to the following, may not be subtracted from the employees's hourly prevailing wage rate:

* Vacation Time
* Sick Time
* Training Funds
* Charitable Contributions
* Worker's Compensation
* Unemployment Insurance
* Uniforms.

Therefore, you are correct in your assumption that the administrative costs attached to employees' pension plans would be regarded as a nondeductible regular business expense.

We do not quite understand your question regarding whether DOS would apply the "last year model" used by the IRS in making its calculation as to the amount of the pension deduction. Please provide us with more detail on what you consider to be "matching" and "discretionary" contributions, along with a copy of IRS rules to which you refer.

You also state in your letter that you understand "that ERISA participation or jurisdiction is helpful but not absolutely necessary" to be considered a "pension plan" under the Statute.

According to our understanding, all bona fide 401k plans, by statutory structure and definition, are covered by ERISA (the Employee Retirement Income Security Act). As such, DOS has not in the past recognized any bona fide 401k plans that were not ERISA approved. Please provide additional information on any bona fide plan you believe exists without having ERISA approval, and we will provide you with a specific answer on whether the plan is an allowable deduction under the prevailing wage law.

Very truly yours,

Kathryn B. Palmer
General Counsel

and

Ron Maranian
Program Manager

cc: Robert J. Prezioso, Deputy Director
Daniel S. Field, Assistant Attorney General, Fair Labor & Business Practices Div.

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