

Required Physical Exams Minimum Wage Opinion Letter 01-18-08

January 18, 2008

I am writing in response to your request, on behalf of your client, for this Office's written opinion regarding the applicability of the Massachusetts Minimum Fair Wage Law, M.G.L. c. 151. Specifically, you have asked whether employees of a long-term care facility must be paid for time attending required pre-employment and periodic physical examinations. [\[1\]](#)

Massachusetts long-term care facilities are licensed by the state Department of Public Health (DPH). DPH regulations require licensed facilities to hire competent staff and maintain evidence of adequate health supervision. 105 C.M.R. §150.002(D). The facility must maintain records of initial and periodic physical/health examinations for all staff, including food service personnel. 105 C.M.R. §105.002(D)(6).

The Massachusetts Minimum Wage Law and Regulations do not include provisions specifically addressing the compensability of required physical exams. However, the Minimum Wage Regulations generally define "working time," in pertinent part, as "all time during which an employee is required to be on the employer's premises or to be on duty, or to be at the prescribed work site, and any time worked before or beyond the end of the normal shift to complete the work." 455 C.M.R. §2.01. This definition of "working time" is substantially identical to the federal definition of the workweek which "ordinarily includes 'all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place.'" 29 C.F.R. §785.7. See also Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-691 (1946). Due to the similarity between the regulations, and in the absence of case law interpreting the state regulations, we will look to federal law for guidance in interpreting the scope of "working time," as it relates to required physical exams. See Goodrow v. Lane Bryant, Inc., 423 Mass. 165, 170 (2000).

On October 7, 1997, and January 26, 1998, the U.S. Department of Labor (DOL) issued Wage and Hour Opinion letters addressing the compensability of required physical examinations under the FLSA. In these letters, the DOL stated the following general principles:

whenever an employer imposes special requirements or conditions that an employee must meet before commencing or continuing productive work, the time spent in fulfilling such special conditions is regarded as indispensable to the performance of the principal activity the employee is hired to perform. Included in this general category are required physical exams ... Where the Federal government requires employees to submit to [physical examinations] as a condition of the employer's license to operate its business, the [examinations] are for the benefit of the employer.

DOL Wage and Hour Opinion Letter, January 26, 1998.

Time spent undergoing a physical examination is time during which the employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee is subject to the employer's discretion and control. It is immaterial whether the time spent in undergoing the required physical examination is during the employee's normal working hours or during nonworking hours. The physical examination is an essential requirement of the job and thus primarily for the benefit of the employer. Therefore, it is our opinion that the time so spent must be counted as hours worked under the FLSA.

DOL Wage and Hour Opinion Letter, October 7, 1997.

However, if the [examination] is conducted prior to an employment relationship between the employer and the potential employee, then the employer may not have to include the time spent in such testing as hours worked.

DOL Wage and Hour Opinion Letter, January 26, 1998.

Given the similarity between the state and federal regulations, and the persuasive reasoning in the federal treatment of this issue, this Office will adopt a similar interpretation of "working time" under state law. Therefore, long-term care facility employees, including food service staff, are entitled to be compensated for required initial and periodic physical examinations. In some instances, examinations may occur prior to the establishment of an employment relationship. In these situations, which must be evaluated on a case-by-case basis, such time may not require compensation.

I hope this information has been helpful. If you have any further questions, please feel free to contact me.

Sincerely,
Lisa C. Price
Deputy General Counsel

cc: Laura M. Marlin, Commissioner, DOS
Kathryn B. Palmer, General Counsel, DOS
Joanne Goldstein, Division Chief, Office of the Attorney General, Fair Labor Divisio

[\[1\]](#) As you know, most employers are also subject to the federal minimum wage and hour law, found in the Fair Labor Standards Act (FLSA), and regulations promulgated thereunder. For information about applicable federal wage and hour laws, you should contact the U.S. Department of Labor.

***=Names have been Omitted