Minimum Wage Opinion Letter **03-10-06 - Hotel Overtime Exemption**

March 10, 2006

I am writing in response to your request for this Office's written opinion regarding the applicability of the Massachusetts Minimum Fair Wage Law. Specifically, you have asked whether banquet servers employed by a hotel, who perform work in a hotel or on hotel property, are exempt from overtime pursuant to M.G.L. c. 151, §1A(12). [1]

As I understand it, your firm represents two hotel chains that operate in Massachusetts. The hotels' properties are managed by the hotel companies and the real estate is owned by a separate third party. The hotels have multiple departments that serve the needs of the guests, e.g. restaurants, in-room dining, housekeeping, laundry. The individual hotel properties vary in size, but generally have in the range of 300-500 guest rooms, at least one restaurant, and more than 18,000 square feet of meeting space. Part of the business of each hotel is catering to groups such as tour groups and business meetings. Each hotel has a banquet department which provides private dining and banquet services to hotel customers - both those staying at the hotel and others who retain the hotel's services solely for a banquet event. Each hotel employs banquet servers and all banquet services are performed in the hotels or on hotel property, such as a tent, or on a rented boat. One client hotel issues paychecks directly from its local hotel properties; the other client utilizes a payroll company.

The Massachusetts Minimum Fair Wage Law, M.G.L. c. 151, s. 1A, provides for the payment of overtime compensation (time and one-half the employee's regular rate of pay) for work in excess of 40 hours in a given workweek in an "occupation" as defined by M.G.L. c. 151, s. 2. Section 2 defines "occupation," in pertinent part, as "an industry, trade or business or branch thereof or class of work therein, whether operated for profit or otherwise, and any other class of work in which persons are gainfully employed . . ." However, M.G.L. c. 151, s. 1A(12) specifically exempts persons employed "in a hotel, motel, motor court or like establishment" (emphasis added), (hereinafter referred to as the "state hotel exemption"). This Office is unaware of any Massachusetts case law that provides guidance as to the scope of this exemption. [2] Therefore, it is left to this Office to give a reasonable interpretation of the statute, and, as we have done in other cases, we will look to federal wage and hour law for guidance. See Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 170 (2000). To this end, some history of the state and federal overtime laws is instructive.

When enacted in 1960, the Massachusetts overtime law included the state hotel exemption, then entitled M.G.L. c. 151, §1A(13). See Chapter 813 of the Massachusetts Acts of 1960. At that time, hotel and motel establishments were part of a general category of "retail or service" establishments exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA). See 29 U.S.C. §213(a)(2). [3] However, there was one significant difference between the state and federal exemptions as they appeared in 1960 - the state exemption covered, and still covers, persons employed "in" a hotel, and the federal exemption covered persons "employed by" a retail or service establishment, such as a hotel. See 29 U.S.C. §213(a)(2). In fact, in 1949, Congress amended the FLSA's retail and service exemption provision, substituting the words "employed by" for "engaged in," in an effort to clarify the scope of the federal exemption. Furthermore, federal regulations specifically address the difference between the two terms. See 29 C.F.R. §779.309 Employed "in" but not "by". (In 1960, this regulation was entitled 29 C.F.R. §779.4.) The history of the cognate federal exemption "is relevant to understanding the intent of the Massachusetts legislature in 1960." Swift v. Autozone, Inc., 441 Mass. 443, 447 (2004).

When the state enacted its overtime law in 1960, the statute included 17 exemptions. Some of these exemptions applied to persons "employed as" certain occupations (e.g. golf caddies, garagemen, or seamen), some to persons "employed in" certain establishments (e.g. hospitals, hotels, restaurants), and one "employed by" a certain employer (an employer licensed and regulated pursuant to M.G.L. c. 159A.) The state hotel exemption uses the term "in" and not "by," and we are constrained to construe the statute in accordance with its plain meaning. See Shabshelowitz v. Fall River Gas Co., 412 Mass. 259, 262 (1992). ("[t]he language of the statute is

the best indication of legislative intent.") Therefore, we interpret the state hotel exemption to include all workers who work in some aspect of hotel operations, including banquet services, within the physical confines of a hotel property. While this interpretation may appear to exempt a broad spectrum of workers, as a practical matter, most hotel workers will still be entitled to overtime under federal law, as the FLSA no longer categorically excludes hotel employees.

Finally, your letter indicates that some hotel banquet services may be performed on other property, such as a rented boat. We decline to extend coverage of the state hotel exemption to such a situation where the services are arguably no longer performed "in" the hotel. Minimum wage and overtime exemptions must be "narrowly construed, giving due regard to the plain meaning of statutory language and the intent of [the Legislature]." A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

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

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[1] As you know, most employers are also subject to the federal minimum wage and overtime law, found in the Fair Labor Standards Act (FLSA), and regulations promulgated thereunder. Your letter states that your clients' banquet servers are exempt from federal overtime requirements because they are commissioned employees under 29 U.S.C. §207(i). This letter expresses no opinion as to that determination.

[2] One court has opined that a possible rationale for such exemptions is to acknowledge that jobs in hotels and like establishments "may require continuous service by a particular person beyond the confines of an eight hour schedule." Fitz-Inn Auto Parks, Inc. v. Comm'r of Labor & Industries, 350 Mass. 39, 42 (1965).

[3] In 1966 and in the 1970's, FLSA coverage was extended to hotels and motel establishments, but the Massachusetts state law has not been similarly amended.

=Names have been Omitted