

## Minimum Wage Opinion Letter 06-28-02 - Split Shifts - Waiting and Travel Time

June 28, 2002

I am writing in response to your request for this Office's written opinion regarding split shifts and travel time. Specifically, you have asked, in the case of a home health aide who works from 8:00 a.m. to 10:00 a.m., goes home, and then returns to work for a 3:00 p.m. to 11:00 p.m. shift: 1.) are the hours between shifts (10:00 a.m. to 3:00 p.m.) compensable time; and 2.) is the travel time compensable time? Also, in the case of an different aide who works from 8:00 a.m. to 4:00 p.m., visiting clients all day and traveling approximately 15 minutes between clients, may the employer pay a different travel time rate from the rate paid the aide for time with clients? I will answer each question in turn. [\[1\]](#)

1.) Are the hours between shifts (10:00 a.m. to 3:00 p.m.) compensable time?

The Massachusetts Minimum Wage Regulations defines "working time," in pertinent part, to include "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 workplace, and any time worked before or beyond the end of the normal shift to complete the work." 455 C.M.R. §2.01. As the employee in your scenario is permitted to leave the worksite and go home, the only remaining question in this case is whether the employee is considered "on duty" between the end of the first shift and the beginning of the second.

The term "on duty" is undefined in the regulations, but the terms "on duty" and "off duty" have been defined under analogous federal law [\[2\]](#) which we may look to for guidance. See Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 170 (2000). Therefore, to determine whether an employee who is free to leave the worksite between shifts is on or off duty, this Office will employ factors used by the U.S. Department of Labor to determine duty status. As a general rule, if: 1.) the employee is completely relieved of all work-related duties; 2.) the employee knows in advance that she or he will have time off between shifts; 2.) the time off is long enough for the employee to effectively use the time as she or he wishes; and 3.) the employee does not have to return to work until a definite, specified time, the employee can be considered off duty and the time is not compensable working time. Your situation would appear to meet these criteria; however, please be advised that each situation must be evaluated on a case-by-case basis. There may be situations where the period of inactivity is too unpredictable, or is of such short duration, that the employee is prevented from effectively using the time for his or her own purposes and, therefore, the employee remains "on duty."

2.) Is the travel time compensable time?

Assuming an employee is off duty between shifts, then travel to and from an employee's worksite is not "working time," as defined by 455 C.M.R. §2.01, and not compensable travel time under 455 C.M.R. §2.03(2) because the employee is not traveling from one place to another at the direction of the employer. (See question three.) Therefore, in your scenario, the travel time from home to work at 8:00 a.m., from work to home (or anywhere else the employee chooses to go) at 10:00 a.m., from home to work at 3:00 p.m., and from work to home at 11:00 p.m. is not compensable time.

3.) In the case of an different aide who works from 8:00 a.m. to 4:00 p.m., visiting clients all day and traveling approximately 15 minutes between clients, may the employer pay a different travel time rate from the rate paid the aide for time with clients?

When an employee is directed by his or her employer to travel from one place to another during a workday, such travel time is compensable under 455 C.M.R. §2.03(2). Section 2.03(2) provides that "[a]n employee who is required or directed to travel from one place to another after the beginning of or before the close of the workday shall be compensated for all of the time spent traveling at the same rate as for working time, and shall

be reimbursed for all transportation expenses." 455 C.M.R. §2.03(2) (emphasis added). A strictly literal interpretation of this provision would say that an employer must pay employees at the same rate as they are paid for their principal activity. [3] However, our interpretation of any regulatory provision is always limited by the scope of the enabling legislation authorizing its promulgation. It is questionable whether this Office, acting for the Director of Labor and Workforce Development, has the authority to dictate to employers what rate of pay -- outside of the statutory minimum wage, special certificates, and overtime pay provisions -- they must pay their employees for a given activity. Given the possible limitations of the statute, this Office interprets this regulation to permit an employer to establish, prior to performance of the work, multiple "working time" rates, one for the work done on the job and the other for travel time. Therefore, in your scenario, you would be permitted to establish, prior to performance of the work, one rate of pay for time spent with clients and a separate rate for compensable travel time during the workday. [4]

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

Sincerely,  
Lisa C. Price  
Legal Counsel

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[1] Please note that 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. The telephone number for the Boston Office is (617) 624-6700.

[2] See 29 C.F.R. §§785.15, 785.16.

[3] As a practical matter, this raises a problem for an employer who employs workers at two or more jobs in a given workweek at two or more bona fide rates of pay, as there is no single rate of pay to base travel time upon.

[4] For the position of the U.S. Department of Labor Wage & Hour Division on this issue, see Wage & Hour Division Opinion Letter, January 22, 1999.

= Names have been omitted