

Minimum Wage Opinion Letter 11-10-03 - Patient Workers in Community Program

November 10, 2003

I am writing in response to your request for this Office's written opinion regarding the Massachusetts Minimum Fair Wage Law and Regulations. Specifically, you have asked whether it is permissible for your client, ***, to pay a sub-minimum wage to persons working in a community program. [1]

As I understand it, the non-profit hospital operates a community program at one of the hospital's facilities, ***. *** offers comprehensive, coordinated care and support for adults with chronic psychiatric illnesses. One of the hospital's programs at the facility has individuals who are currently undergoing treatment perform cleaning and maintenance services as a cleaning crew. Members of the crew work under the supervision of a program manager for a few hours daily. Your client wishes to pay these persons approximately \$6.00 per hour for this work. You have stated that the primary goal of the cleaning program is to allow members to learn work and illness management skills to assist them to transition out of the program and enter the workforce. However, it is also clear that these individuals perform a service for the facility that would otherwise need to be performed by paid staff. Your letter indicates that a professional cleaning staff performed the work in the past.

The Massachusetts Minimum Fair Wage Law, M.G.L. c. 151, which establishes the state minimum wage, applies to persons employed in an occupation as defined in M.G.L. c. 151, §2. We note at the outset that "work by persons being rehabilitated or trained under rehabilitation or training programs in charitable, educational or religious institutions" is excluded from the definition of "occupation" under the state minimum wage law. M.G.L. c. 151, §2. However, given that the hospital receives an economic benefit from the patients' work, that their work displaces other persons who would otherwise have to be hired to do the cleaning, and that the hospital intends to pay an hourly wage, this program would not appear to meet the test adopted by DOS for a rehabilitation or training program. See attached DOS Opinion Letter, dated May 9, 2003. Therefore, for purposes of the minimum wage law, these individuals are considered in an "occupation" and entitled to at least minimum wage for all hours worked unless a sub-minimum wage waiver has been issued.

The Massachusetts Minimum Fair Wage Law, M.G.L. c. 151, §9, permits the Division of Occupational Safety, per authority of the Director of Labor, to issue sub-minimum wage certificates (also known as "waivers") to employers of persons whose earning capacities are impaired by mental illness. The hospital has the option to apply for such a waiver; however, any waiver application would have to include a prevailing wage survey for this type of work, and documentation to support a lower, commensurate wage rate for each individual worker. As your correspondence has indicated that these individuals are actually providing better services than the professional cleaning crew who were previously hired, there may, in fact, be no basis for a sub-minimum wage waiver in this instance. Also, please be advised that a federal certificate may also be necessary, if your client wishes to pay less than the federal minimum wage of \$5.15 per hour. See 29 C.F.R. 525. See also U.S. Department of Labor Field Operations Handbook, Section 64c01: Patient Worker, available online at: www.dol.gov/esa/whd/FOH/ch64/64c01.htm.

I hope this information has been helpful. Please note that this opinion is based solely on the information provided with your request. The existence of other facts not

contained in your request might require a different conclusion. If you have any further questions, please feel free to contact me.

Sincerely,
Lisa C. Price
Legal Counsel

[1] As you know, 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