Opinion Letter MW

December 10, 2009

Re: Compensability of Pre-Employment Screening Program

I am in receipt of your September 16, 2009 request for a written opinion from the Division of Occupational Safety (hereinafter "Division") as to whether your client (hereinafter the "Company") is required to pay people for attending "a new pre-employment screening program" which the Company is offering. According to your letter, the Company employs people to provide companion and skilled nursing care to people at home, to avoid the necessity of nursing home care. The Company's hiring process includes, in addition to an initial interview, a four day pre-employment screening program, during which "the prospective employee receives training" to become a personal care attendant ("PCA"). Your question is whether the Massachusetts minimum wage law requires the Company to pay these individuals for the time during which they are attending the pre-employment screening program.

As you know, the Massachusetts minimum wage law prohibits "any employer" from employing "any person in an occupation in this commonwealth" for less than the minimum wage. G.L. c. 151, s. 1. The question presented by your inquiry is whether the individuals attending the pre-employment screening are employed by the Company at the time of the screening, and thus subject to the minimum wage. This question has not been addressed directly by the courts in Massachusetts, nor has the Division addressed it in its published opinion letters. Due to the similarity between the Massachusetts minimum wage law and regulations and the federal Fair Labor Standards Act ("FLSA"), the Division looks to, but is not bound by, interpretations under the FLSA for guidance. See Goodrow v. Lane Bryant, 432 Mass. 165, 170 (2000).

The U.S. Department of Labor ("US DOL"), in interpreting similar questions under the FLSA, has set forth a six-factor test for determining whether individuals participating in training programs are employees under the FLSA or whether they are "trainees" not covered by the Act. See US DOL opinion letters dated January 30, 2001, 2001 WL 1558755 and October 19, 2004, FLSA2004-16; and Donovan v. American Airlines, 686 F.2d 267, 273 (5 th Cir. 1982). Because the inquiry here is substantially the same as that under the FLSA, the Division sets forth the following test based, in part, upon the U.S. DOL six-factor test, with modifications to the analysis of the factors and including another factor DOS deems relevant, in analyzing the present matter under the Massachusetts minimum wage law. [1] The seven factors, and the Division's application of the facts presented in your letter to them, are as follows:

1. *The training, even if it includes actual operation of the facilities of the employer, must be materially related to the employment being sought by the applicant, as it would be in a vocational school.* In this case, you have indicated that the training does not include working in the actual operation of the facilities of the employer, but that the people participating in the pre-employment screening are "exposed to a variety of different information regarding providing either PCA or companion care" and "dealing with people who have Alzheimer's disease or other forms of dementia. It also covers what will be expected in direct physical contact with a possible client including the requirements to assist in movement or in general hygiene." You have also provided a syllabus for the four day program. A review of the syllabus indicates that the training is akin to what is taught in a vocational school, because the training is in the skills required to become employed as a PCA, and that it is therefore materially related to the employment being sought by the applicant, as it would be in a vocational school.
2. *The training is for the benefit of the trainees.* Your letter states that the training "would allow the individual to receive designation from the Company as a personal care attendant" and that the pre-screening program enables the participants to "determine that these types of situations are not for them." The designation by the Company of the trainee as a personal care attendant is not considered by the Division to be a benefit for the trainee, as it is not an official designation by a licensing or other similar

entity. However, the trainees do benefit from the training by learning new skills which could result in their being hired by the Company, and being in a position to judge whether they would like to have a job as a PCA, with this company or another. Additionally, you have indicated that the training is offered to the individuals at the pre-employment stage, free of charge, whereas others who wish to take the training would be required to pay for it.

3. *The training does not displace regular employees, and trainees work under close supervision.* By the terms of your letter and the materials you submitted, the trainees are not involved in actual work situations with the Company's employees, and so no employees are displaced. The issue of close supervision does not arise as no actual work on site is done.
4. *The training provides the employer with no immediate advantage from the activities of the trainees, and on occasion his/her operations may actually be impeded.* In the situation described, since the trainees are not working with clients of the Company or in real work situations, the Company is receiving no immediate benefit from the time spent by the trainees in the training. In fact, you have indicated, that even after this pre-employment training, if the individual is hired, he or she must complete an additional one-day training after they have been hired, at the company's expense. In that situation, the individual would be deemed an employee and would be paid for the time in the training.
5. *The training does not necessarily lead to a job to which the trainee is entitled.* You have indicated that 15% of the trainees are not hired, and that hiring is done after the pre-screening program is completed, at which time the person "may be offered a job with the Company." Thus, trainees have no entitlement to a job with the Company after the training is completed. If the participants in the pre-employment screening were promised a job upon successful completion of the four-day training program, the Division would interpret this factor differently, with a different conclusion
6. *The training is based on a mutual understanding between the employer and the trainee that the trainee is not entitled to wages for the time spent in training.* You have provided the Division with a Pre-Employment Questionnaire that job applicants receive, in which they are asked if they "are able to continue the pre-screening process by attending a four (4) day unpaid seminar." Thus, the trainees understand that they will not be paid for the four day training.
7. *The applicant can opt out of the training if he already possesses the skills required for the position, by, for example, passing a test prior to the training.* You have indicated that if the applicant has experience as a PCA and has been working in the field for at least one year, he can take a test, and if he passes, can opt out of the pre-employment training prior to its beginning, and the Company can then decide whether to offer the person a job.

The Division concludes, based upon the foregoing, that individuals participating in the four day pre-employment screening program run by the Company are not employees within the meaning of G.L. c. 151, s. 1, The prospective employee receives training in the program similar to that received in a vocational school; the training benefits the person by giving him skills related to the job and informing his judgment about whether the job is right for him; it does not displace regular employees; it gives the Company no immediate benefit; it does not automatically lead to a job; the participant has no expectation of being paid for the training; and the applicant can opt out of the training if he demonstrates that he already possesses the skills and experience required for the position.

The Division's finding in this matter is limited to the facts as presented by the Company through counsel, and different facts in subsequent inquiries could lead to a different conclusion by the Division.

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

Sincerely,
Mitchell Goldstein
General Counsel

[1] The Division has followed the six-factor analysis in interpreting the exception to the definition of occupation for training programs in charitable, educational or religious institutions under G.L. c. 151, s. 2. See MW-2002-013 and MW-2003-002. In those opinion letters, the Division did not require that all six factors be met. However in the present context, because the inquiry is whether the individuals are employees or trainees, the Division will apply the test in the same manner as the US DOL, requiring all six factors, as well as a seventh factor described below, in order to determine that an individual is a trainee and not subject to the minimum wage law.