

Minimum Wage Opinion Letter **12-16-04 - Teachers and Salary Basis Test**

December 16, 2004

Your letter to the Massachusetts Attorney General has been forwarded to me for a response. The Division of Occupational Safety (DOS), an agency under the Massachusetts Departments of Labor and Workforce Development, is responsible for responding to inquiries concerning the applicability of the Massachusetts Minimum Fair Wage Law, M.G.L. 151, and regulations promulgated thereunder. [1] You have asked whether, under Massachusetts law, a "teaching professional" employed by an "educational establishment" (as those terms are defined by federal regulations promulgated under the Fair Labor Standards Act) may be paid on an hourly basis and still retain his/her status as a professional employee exempt from state overtime law. [2]

The Massachusetts Minimum Fair Wage Law, M.G.L. c. 151, §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, §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, but shall not include professional service..." In addition, M.G.L. c. 151, §1A(3), specifically excludes any employee who is employed "as a bona fide executive, or administrative or professional person or qualified trainee for such position earning more than eighty dollars per week." The Massachusetts Minimum Wage Regulations provide that "[t]he terms 'bona fide executive, or administrative or professional person' in M.G.L. c. 151, §1A(3), shall have the same meaning as set forth in Part 541 of Title 29 of the U.S. Code of Federal Regulations." 455 C.M.R. §2.02(3) (Part 541 of Title 29 is hereinafter referred to as the "EAP Regulations").

Under the EAP Regulations, teachers are considered exempt professionals if their primary duty is "teaching, tutoring, instructing or lecturing in the activity of imparting knowledge," if they are employed and engaged in this activity as a teacher in an "educational establishment," as that term is defined in the EAP Regulations. See 29 C.F.R. §541.303(a). The EAP regulations' salary and salary basis test requirements do not apply to bona fide teachers. 29 C.F.R. §541.303(d). Therefore, as the Massachusetts Minimum Wage Regulations provide that the term "bona fide professional person" shall have the same meaning as under federal law, bona fide teachers, i.e. those meeting the above primary duties test, may be paid on an hourly basis and retain their exempt status under state overtime law.

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

[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.

[2] As I understand it, you represent the proprietor of several trade schools that operate, or will soon operate, in Massachusetts. However, the question you have posed is of a general nature, and in the absence of specific information about your client's operation, this opinion provides only a general response to the issue you have raised.

