

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR
DIVISION OF OCCUPATIONAL SAFETY
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Commissioner

June 12, 2006

F. Henry Ellis, III, Esq.
4 Pearl Street
Dedham, MA 02026

Re: MW-2006-002
Prevailing Wage and Overtime

Dear Attorney Ellis:

I am writing in response to your request for this Office's written opinion regarding the applicability of a Massachusetts Prevailing Wage Law, G.L. c. 149, §27F, and the Massachusetts Overtime Law, G.L. c. 151, §1A. Specifically, you have asked how overtime should be calculated for an employee who performs work subject to one of the state prevailing wage laws, in this case, G.L. c. 149, §27F.¹ The employees in question work for a private company and perform solid waste collection services for a Massachusetts municipality.

The Massachusetts Prevailing Wage Law, G.L. c. 149, §27F, requires the payment of prevailing wage to operators of trucks, vehicles or equipment on non-construction public works projects. Perlera v. Vining Disposal Service, Inc., 47 Mass. App. Ct. 491 (1999). For such projects, the Division of Occupational Safety (DOS) issues rate sheets which list the total rates to be paid such workers for each job classification. Under G.L. c. 149, §27F, the only permissible deduction an employer may

¹ As you know, most employers are also subject to the federal overtime 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. It is important to note that private sector employees are subject to both state and federal overtime laws, and are entitled to overtime according to the higher standard, i.e., the standard that results in the higher rate of pay. See 29 C.F.R. §778.5.

make from this total rate is for employer contributions to bona fide health and welfare benefit plans.²

The Massachusetts Overtime Law, M.G.L. c. 151, §1A, requires time and one-half pay for all covered, non-exempt workers when their hours exceed 40 hours in a given workweek. This law is equally applicable to employees working in jobs subject to the prevailing wage; there is no separate overtime provision within the state prevailing wage law.³ The Massachusetts Minimum Wage Regulations define “regular hourly rate” to be the “amount that an employee is regularly paid for each hour of work,” but that rate “shall not include ... sums excluded under 29 U.S.C. §207(e).” 455 C.M.R. §2.01. Under 29 U.S.C. §207(e)(4), “contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing ... health insurance” are excluded from the regular hourly rate for purposes of overtime calculation.⁴

An example is illustrative, and I will address the example included with your letter:

In a given workweek, an employee performs 50 hours of solid waste collection services for a municipality. The total wage rate listed on the schedule issued by the DOS is \$20.00. The employer contributes monthly premiums to a bona fide health insurance plan that equates to \$3.75 per hour, leaving a cash wage to the employee of \$16.25 per hour.

The employee’s compensation for this workweek is calculated as follows:

$\$16.25 \times 40 \text{ hours} = \650.00

$\$24.38 (\$16.25 \times 1.5) \times 10 = \243.80

Total compensation = \$893.80

Please note that if the employer in the above example made no contributions to a bona fide health insurance plan, the employee would be due the total cash wage of \$20.00 per hour, and the overtime rate would be \$30.00 per hour.

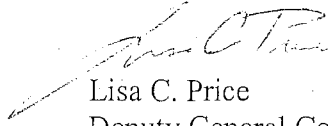
² Other prevailing wage laws, such as G.L. c. 149, §27, permit further deductions for employer contributions to bona fide pension and supplemental unemployment benefit plans.

³ Contrast the state prevailing wage law’s federal counterpart, the Davis-Bacon Act, 40 U.S.C. §276a, which provides for the treatment of fringe benefits in the computation of overtime under the Fair Labor Standards Act.

⁴ While 29 U.S.C. §207(e)(4), and 455 C.M.R. §2.01 by reference thereto, excludes payments for employer contributions to other bona fide benefit plans such as pension plans, in the case of an employee subject to the prevailing wage law, it is necessary to construe the prevailing wage and overtime statutes together. See Board of Education v. Assessor of Worcester, 368 Mass. 513-514 (1975) (“where two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose.”). Deductions from pay, other than employer contributions to health and welfare plans, are not permissible under G.L. c. 149, §27F.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa C. Price". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Lisa C. Price
Deputy General Counsel

cc: Robert J. Prezioso, Commissioner, DOS
Kathryn B. Palmer, General Counsel, DOS
Chris Buscaglia, Division Chief, Office of the Attorney General, Fair Labor &
Business Practices Division