

Prevailing Wage Opinion Letter November 12, 2013

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RE: "Cash fringe" payments and permissibility of certain deductions from the Prevailing Wage

Dear X:

You have written to the Massachusetts Department of Labor Standards (DLS) for clarification as to allowable deductions under the Massachusetts Prevailing Wage Law. First, you have asked whether a "cash fringe" payment is an allowable deduction under Massachusetts Prevailing Wage Law. Second, you have asked if vacation and holiday benefits are allowable deductions.

The DLS sets prevailing wages for public construction projects in accordance with G.L. c. 149, §§26, 27. The prevailing wage rate set by DLS includes employer payments to bona fide health and welfare, pension, and supplementary unemployment benefit plans. See G.L. c. 149, §27. The Prevailing Wage statute permits employers to deduct contributions to bona fide health and welfare, pension, and supplementary unemployment benefit plans from the hourly prevailing wage rate. G.L. c. 149, §27 further provides that, "Any employer . . . who does not make payments to a health and welfare plan, a pension plan and a supplementary unemployment benefit plan, where such payments are included in said rates of wages, shall pay the amount of said payments directly to each employee engaged in construction." This provision requires employers who do not contribute to the plans to pay all of the funds directly to the employee. Some employers elect to issue a separate check for the "benefit portion" of the prevailing wage. These separate checks are to be treated no differently than the check for "base wages" and are, in fact, wages subject to all applicable state and federal tax and insurance requirements. An employer cannot deduct any part of a "cash fringe" payment from the total prevailing wage rate. Accordingly, since a "cash fringe" payment is not an allowable deduction, when determining the rate of overtime pay, the "cash fringe" wages must be included in the regular rate of pay upon which the overtime rate is then calculated.

With regard to the permissibility of vacation and holiday benefits as allowable deductions, I quote from a previously-issued letter on this topic: PW-2009-09-11.25.09—Request for Opinion Regarding Permissibility of Deduction under the Massachusetts Prevailing Wage Law:

DLS has issued a number of opinion letters outlining permissible deductions from the prevailing wage rate... *Letter to Higgins, 12/19/97* [characterizing vacation, holiday and sick pay as non-allowable credits]; *Letter to Hopwood, 10/5/89* [deductions may not be taken for any benefit which is not expressly mentioned in the law, including for vacation and holiday pay.] In two of these opinion letters, DOS[\[1\]](#) has characterized vacation, holiday and sick pay as "non-allowable credits". Implicit but not expressed in these opinions is that the value of vacation, holiday and sick pay may not be deducted from the prevailing wage rate because they do not qualify as "health and welfare plans" within the meaning of §§ 26 and 27 and are therefore not included in the DLS's wage rate determinations. [\[2\]](#)

Employer deductions from prevailing wages, pursuant to c. 149, §§ 26 and 27, may not include holiday, vacation, or sick pay.

I hope this information has been helpful.

Sincerely,

Heather Rowe

Director

¹ Prior to April, 2011, the Department of Labor Standards was known as “the Division of Occupational Safety (DOS).” See Article 87 of the Amendments to the Constitution, “An Act Reorganizing the Executive Office of Labor and Workforce Development.”

[2] ...As provided on the Prevailing Wage Topical Outline, in determining permissible deductions, DOS, consistent with its earlier interpretations, follows the rule set forth in *Commonwealth v. Waste Management, Inc. No. 96-1640F (Mass. Super. Ct. , January 14, 1999)* [Employer deductions from prevailing wages paid under M.G.L. c. 149 § 27F may include those for medical, dental, life and disability benefits, but not those for the employer portion of FICA or other social security payments, holidays, personal days, or vacation days.]