

Prevailing Wage Program Opinion Letter 11-25-09

Re: Request for Opinion Regarding Permissibility of Deduction under the Massachusetts Prevailing Wage Law

Your letter dated October 15, 2009, to Mitchell Goldstein, General Counsel of the Division of Occupational Safety ("DOS"), has been forwarded to me for response.

In your letter, you ask for the written opinion of this agency regarding Massachusetts Prevailing Wage Law, M.G.L. c. 149, § 26 et. seq. Specifically, you seek DOS' opinion as to whether holiday pay, vacation pay and sick pay may be deducted from the prevailing wage rates paid by employers as "health and welfare benefits" within the meaning of the statute. [\[1\]](#)

Analysis

Under the Massachusetts Prevailing Wage Law, DOS sets prevailing wages for public construction projects. *M.G.L. c. 149, §§ 26 and 27*. Significantly, "Payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans *under collective bargaining agreements or understandings between organized labor and employers* shall be included for the purposes of establishing minimum wage rates." §§ 26 and 27 (*italics added*.) The law 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." § 27. This provision requires employers who do not contribute to the plans to pay all of the funds directly to the employee.

It should be noted that DOS does not include any contributions made toward vacation, holiday or sick pay, in setting the prevailing wage rate for the reasons set forth herein. Therefore, an employer may not legally deduct such payments from the prevailing wage rate.

A. The Legislature Limited the Term "Health and Welfare Plans" by Reference to "Collective Bargaining Agreements"

The legislature did not define the term "health and welfare plan" as it is used in the prevailing wage law. However, the plain language of the statute clearly requires that the types of plans and amounts of payment included in setting the wage rates be based on the types of plans and amounts of payment set forth in the applicable collective bargaining agreements or understandings between organized labor and the employer. In short, by use of the modifying phrase "under collective bargaining agreements", the legislature intended to limit the meaning of the term "health and welfare plans." (*See, e.g. Simon v. State Examiners of Electricians*, 395 Mass. 238, 242 (1985) [Legislature intended to narrow the definition of the term "electricity" by use of modifying language "for light, heat or power purposes".]) The statute may be fairly read as directing DOS to look at collective bargaining agreements in determining what constitutes a "health and welfare plan" within the meaning of the statute. Significantly, we note that collective bargaining agreements we have reviewed do not include payments to vacation funds or holiday pay as payments to "health and welfare plans."

B. Even if Collective Bargaining Agreements do not Refer to "Health and Welfare Plans", the Legislature Gave DOS Authority to Define the Term

Your query suggests that certain collective bargaining agreements may not refer to "health and welfare [plans]." If true, this does not change our determination. The legislature gave broad policy making authority to the commissioner of DOS to determine the prevailing wage rate, which includes the authority to give plain meaning to terms used in the prevailing wage law. *See e.g. Teamsters Join Council v. Director of the Department of Labor and Workforce Development*, 400 Mass. 100, 108 (2006) [commissioner's decision that prevailing wage law did not cover time spent by truck drivers hauling bituminous concrete to and from construction sites entitled to deference.]

DOS has issued a number of opinion letters outlining permissible deductions from the prevailing wage rate. (*See e.g.*, PW-2008-07-8.26.08 [contributions to an ERISA compliant, U.S. DOL approved self-funded health and welfare plans permissible deductions from prevailing wage rate]; *DOS Letter to Baragona*, 9/8/03 [contributions to hours bank plan for purchase of health benefits permissible deduction under the prevailing wage law]; *Letter to Beeman*, 10/2/02 [employers may calculate an hourly health plan deduction by dividing a monthly health insurance premium by an employee's customary hours of work]; *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 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 DOS's wage rate determinations. [2] We take this opportunity to clarify that, 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 to you.

Sincerely,
Patricia A. DeAngelis
Legal Counsel, DOS

[1] The quotation is from your letter, the statute refers to "health and welfare plans" not "health and welfare benefits."

[2] Your letter cites an unpublished Massachusetts Superior Court decision, *Charles, et al v. Roads Paving Corp.* 1999 WL 1203754 (Mass. Super. Ct. September 29, 1999), to support the proposition that "holiday benefits" should be included within the category of "health and welfare plans" for the purposes of determining the prevailing wage. DOS is aware of the *Roads* decision (*See* DOS website: www.mass.gov.dos: Prevailing Wage Topical Outline, at page 44.) 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 vacations days.]