Minimum Wage Opinion Letter **04-27-05 - Meal Breaks and Unauthorized Working Time**

April 27, 2005

I am writing in response to your request for thisOffice's written opinion regarding the applicability of the Massachusetts Minimum Fair Wage Law and Regulations. Specifically, you have asked whether an employer may implement a mandatory one-half hour meal break policy and deduct that one-half hour whether nor not the employee actually takes the time off.[1]

As I understand it, the employer in question has a posted policy that requires all employees to take a one-half hour meal break if they are working more than five (5) hours in a given work day. The policy further states that if a meal break is not taken, that the "time will automatically be deducted from that day."

As an initial matter, Massachusetts wage and hour law does not restrict an employer's ability to set work schedules for their employees. Therefore, it is permissible to establish a mandatory meal break, and, in fact, M.G.L. c. 149, §§100-101, requires most employers to provide at least a 30-minute meal break when an employee works more than six (6) hours. The remaining question is whether an employer must compensate an employee who does not take the mandatory break. The answer to that question requires an examination of what constitutes "working time" under Massachusetts law.

The Massachusetts Minimum Wage Regulations define "working time," in pertinent part, as:

all time during which an employee is required to be on the employer's premises or to be on duty, or to be at the prescribed work site, and any time worked before or beyond the end of the normal shift to complete the work.[2]

455 C.M.R. §2.01. This definition of "working time" is substantially identical to the federal definition of the workweek which "ordinarily includes 'all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place.'" 29 C.F.R. §785.7. See also Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-691 (1946). Due to the similarity between the regulations, and in the absence of case law interpreting the state regulations, we will look to federal law for guidance in interpreting the scope of the state definition of "working time." See Goodrow v. Lane Bryant, Inc., 423 Mass. 165, 170 (2000).

Under the Fair Labor Standards Act (FLSA), the term "employ" is defined to mean "to suffer or permit to work." 29 U.S.C. §203(g). However, this broad definition of employment, and the definition of workweek discussed above, has been narrowed by judicial interpretation.[3] See, e.g. Prime Communications, Inc. v. Sylvester, 34 Mass. App. Ct. 708, 711 (1993), review denied, 416 Mass. 1104 (1993). On the subject of unauthorized work, numerous courts have stated that the relevant inquiry under the FLSA is whether the employer had actual or constructive knowledge that the work was being performed. If an employer knew, or should have known, that an employee was performing work on its behalf, the employer must compensate the employee, even if the work was unauthorized. 29 C.F.R. §785.11. See also, Republican Publishing Co. v. American Newspaper Guild, 172 F.2d 943, 945 (1st Cir. 1949); Forrester v. Roth's I.G.A. Foodliner, 646 F.2d 413, 414 (9th Cir. 1981)(an employer who knows, or should know, that an employee is working cannot stand idly by and allow an employee to perform work without the appropriate compensation). However, if the employer did not know, and had no reason to know, that an employee was working, such time will not be compensable. Prime Communications, Inc. 34 Mass. App. Ct. at 711, citing Forrester v. Roth's I.G.A. Foodliner, 646 F.2d at 414. (where an employer has no knowledge that an employee is working, and the employee fails to notify the employer or deliberately prevents the employer from discovering the work, the employer's failure to pay is not a violation of the FLSA).

This Office considers the same inquiry relevant to a determination of whether unauthorized work is compensable under state law. Therefore, in the situation you have described, a factual inquiry would be necessary to determine if unauthorized work performed during a mandatory meal break was done with the actual or constructive knowledge of the employer.

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

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[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] This definition further provides that "[w]orking time does not include meal times during which an employee is relieved of all work-related duties. As the instant case concerns employees performing work during meal times, this portion of the definition is inapplicable.

[3] The concept of working time has also been modified by the Portal-to-Portal Act which provides exceptions for preliminary and postliminary activities. See 29 C.F.R. §785.7.

= Names have been omitted