

Minimum wage Opinion Letter 09.13.10

Re: Live In Health Care Workers: Compliance with Massachusetts Minimum Wage Law Regarding Sleeping and Meal Break Time

I am writing in response to your request for the Division of Occupational Safety's ("DOS") written opinion regarding the applicability of the Massachusetts Minimum Fair Wage Law, G.L. c. 151. Specifically, you have asked about the permissibility under the law of your client's method of calculating overtime compensation and compensation for sleep/rest time as well of for deductions from its employees' wages for transportation and telephone calling cards. [\[1\]](#)

In your letter dated July 29, 2010, you state that many of the company's live-in non-exempt caregivers work 24 hour shifts and you would like clarification regarding calculation of overtime for such workers. You have also represented that, during the same period, each homecare worker is entitled to six (6) hours of duty-free time during which the employee is permitted to leave the premises to attend to his or her personal needs. The employee is also provided at least ten (10) hours of uninterrupted sleep. In response to a request for clarification, you wrote that the employees are paid for two (2) of the ten hours of "rest time." In short, the employees are paid for ten (10) hours per day for a total of seventy (70) paid hours per week based on the above-described schedule. An overview of the Minimum Wage Law is instructive in responding to your questions.

Analysis

The Massachusetts Minimum Wage law, M.G.L. c. 151, § 1, establishes the state minimum wage for employees in an "occupation" as defined in c. 151, § 2. Chapter 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". *See also 455 C.M.R. §2.02(3).*

As a preliminary matter, DOS has long opined that the Minimum Wage Law and over time laws apply to live-in home health care aides, companions, and nannies. *DOS Opinion Letter MW-2002-020. See also, DOS Opinion Letter to Carolyn Waldmann, dated November 19, 1999.* Accordingly, live-in home health care aides and/or companions must be paid at least the current minimum wage for the first 40 hours worked in a single work week. If the employee works more than 40 hours in a single work week, the employee must be paid at the overtime rate for each additional hour. For example, if an employee is paid at the regular rate of \$8 per hour, as suggested in your letter, the overtime rate would be \$12 per hour for each additional hour of "working time" over 40 hours in a single workweek. The method by which "working time" is calculated under the Minimum Wage Law is addressed below.

Calculation of Working Time

The Massachusetts Minimum Wage Regulations, 455 CMR § 2.01, define "working time", generally, 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. Working time does not include meal times during which an employee is relieved of all work related duties.

The Massachusetts Minimum Wage Regulations contain special provisions which address situations, such as described in your letter, where employees are required to be on duty at the work site for 24 hour periods. These special provisions supplement the more general definition of "working time" set forth in 455 CMR § 2.01. *See, e.g. Boone v. Commerce Insurance Com, 451 Mass. 192, 197 (2008).* Specifically, 455 CMR § 2.03(3)(b) provides:

Where an employee is required to be on duty at the work site for 24 or more hours, the employer and employee may agree prior to the performance of the work to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than eight hours from working time, provided the employer provides adequate sleeping quarters and the employee can usually enjoy an uninterrupted night's sleep. If no prior agreement is made, sleeping and meal time will constitute working time. If the sleeping period is interrupted by a call to duty, all such time on duty must be counted as working time. If the sleeping period is interrupted to such an extent that the employee can not get a reasonable night's sleep, the entire period must be counted as working time. (*Italics added*).

Under the express language of the regulation, employees who are required to be on duty at the work site for twenty-four hour (or more) shifts are required to be paid for both meal time and sleeping time in the absence of a prior agreement which provides for a scheduled sleeping period and meal period(s). With respect to "sleep time", the employer is excused from compensating the employee for a maximum of eight hours of sleep time for each twenty-four hour period. As provided by the regulation, if the employer opts to enter into such an agreement with its employee, the employer is required to provide adequate sleeping quarters to permit the employee to obtain an uninterrupted night's sleep of at least eight hours for every twenty-four hour period. Employers must also be mindful that, if such sleeping period is interrupted by a call to duty, the employee must be compensated, at the applicable pay rate, for the period of time during which he or she is called to duty. If the call to duty is of such nature that the employee cannot obtain a reasonable night's sleep, the employee must be compensated at the applicable rate for the entire eight hour period. The agreement, which we recommend be in writing, may also provide for meal periods in compliance with above-discussed statutes and regulations and with c. 149, § 100, which requires employers to provide employees who work six hours or more with a thirty minute meal break.

Deductions for transportation and telephone calling cards

The Minimum Wage Regulations set forth the permissible deductions which may be made from the minimum wage and from an employee's regular hourly rate for purposes of overtime calculation. None of the deductions about which you have inquired may be made from an employee's statutory minimum wage. See 455 CMR § 2.04. Deductions that do not impact the minimum wage, and do not improperly reduce an employee's regular or overtime hourly rate are permissible under the Minimum Wage Law. However, as provided in footnote 1, such deductions may be restricted under Federal law. See e.g. 29 CFR §§ 778.304-778.307.

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

Sincerely,
Patricia A. DeAngelis
Acting Deputy Commissioner

[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 at (617) 624-6700.