



New York State Department of Labor  
Elliot Spitzer, Governor  
M. Patricia Smith, Commissioner

November 21, 2007



Re: Request for Opinion  
Meal Breaks - Labor Law §162  
Our File No.: RO-07-0095

Dear [Redacted]:

I have been asked to respond to your letter of August 28, 2007 in which you ask various questions regarding the applicability of Labor Law §162 to various hypothetical scenarios. Please be advised that this office cannot answer your questions as posed. Instead, this letter sets forth the Department of Labor's interpretations of various issues of law raised by your questions.

The Counsel's Office of the New York State Department of Labor is the attorney for the Commissioner of Labor and her agents and employees. Accordingly, this office cannot give legal advice and counsel to any other person or entity. There is no statute, ordinance, rule or regulation requiring this Department to issue opinion letters. Rather, they are offered as a courtesy to persons seeking guidance in specific circumstances. They are not intended to be overarching statements of law and policy covering all conceivable situations. They are more analogous to court decisions dealing solely with the issues of a "case in controversy" than to legislative or regulatory provisions designed to be applicable in all situations. For these reasons, this office will issue opinions only regarding actually existing situations, or on general questions of law. Accordingly, this office will not state, as you request, which of the various conflicting hypothetical scenarios you pose are the "correct" course of action, as that would be tantamount to providing legal advice. Instead, this letter will provide you with this Department's current interpretation of the various legal issues perceived to be raised by your letter. With this information, you may provide such advice to your clients as you see fit.

**I. THE LENGTH OF AN EMPLOYEE'S "SHIFT" OR "PERIOD" IS DETERMINED ON A CASE-BY CASE BASIS, CONSIDERING ALL RELEVANT FACTS AND CIRCUMSTANCES.**

The Court of Appeals has held that the purpose of Labor Law §162 is "clearly to confer a benefit upon individual workers. The Legislature has determined that persons who work the

designated hours must, for their own health and welfare, be given adequate opportunity to eat and rest. There is a public interest implicated in the statute as well, for the exhausted worker is a danger to his co-workers and the public as well as himself," (*Matter of ABC v. Roberts*, 61 N.Y.2d 244, 248-249 (1984)).

According to general rules of statutory interpretation, a statute promoting the public good is to be liberally construed (*see* Statutes §341). Furthermore, it is well-settled that remedial legislation intended to alleviate a hardship is "to be liberally construed so as to permit as many individuals as possible to take advantage of the benefits it offers" (*Settlement Home Care, Inc. v. Industrial Board of Appeals*, 151 A.D.2d 580, 581 (2nd Dept. 1989) (citation omitted)).

Federal regulation 29 CFR §778.223, defines the term "hours worked," for FLSA purposes, as including "[a]ll time during which an employee is required to be ... on the employer's premises or at a prescribed workplace ... Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness."

The Court in *Moon v. Kwon*, 248 F. Supp.2d 201 (SDNY 2002) relied upon both this regulation and the holding of *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) ("[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen)" and framed the issue as follows:

The question of whether time is spent predominantly for the employer's benefit, and therefore constitutes time "worked" under FLSA, "depends upon particular circumstances." ... The "[f]acts may show that the employee was engaged to wait," making the time compensable, or that the employee instead "waited to be engaged," rendering the time not compensable ... For example, when periods of inactivity are "unpredictable ... [and] usually of short duration," and the employee "is unable to use the time *effectively* for his own purposes," then the employee is "engaged to wait," and the inactive time constitutes "work" time under the FLSA--*even if "the employee is allowed to leave the premises or the job site during such periods of inactivity."* ... On the other hand, when an employee "is not required to remain on the employer's premises but is merely required to leave work at his home or with company officials where he may be reached," then the employee is "waiting to be engaged," and therefore not "work[ing]" under FLSA during that inactive time. (248 F. Supp.2d at 229). (Citations omitted). (Emphasis added).

Also note that federal regulation 29 CFR §785.15 defines "on duty" by stating that:

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, a fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity ... The

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periods during which these occur are unpredictable. They are usually of short duration. In either event, the employee is unable to use the time *effectively* for his own purposes. It belongs to and is controlled by the employer. *In all of these cases waiting is an integral part of the job. The employee is engaged to wait.* (Citations omitted). (Emphasis added).

Furthermore, please note that the FLSA is not the only standard that may be applied to this issue. 29 U.S.C. §218(a) clearly states that the FLSA does not preempt state laws, and that a state may set standards that are more beneficial to workers (*see Manliguez v. Joseph*, 226 F.Supp.2d 377 (EDNY 2002)). New York State regulation 12 NYCRR §142-3.4 states that employees must receive, at minimum, an additional amount of wages above the minimum wage if they work a "spread of hours" exceeding ten hours, or a "split shift." 12 NYCRR §142-3.15 defines a "split shift" as a schedule of hours in which the working hours required or permitted are not consecutive. 12 NYCRR §142-3.16 defines a "spread of hours" as the interval between the beginning and end of an employee's workday, which period includes working time, time off for meals, and intervals of off-duty time. Accordingly, the terms "shift" and "period" as used in Labor Law §162 as a whole may include "split shifts" and "spreads of hours" under appropriate circumstances.

**II. THE WORD "OVER" AS USED IN THE FINAL SENTENCE  
OF LABOR LAW §162(2) MUST BE INTERPRETED TO MEAN THAT  
AN EMPLOYEE MUST WORK FOR THE ENTIRE PERIOD FROM  
ELEVEN A.M. TO TWO P.M. TO BE ELIGIBLE FOR THE MEAL  
PERIOD REQUIRED BY THAT SECTION OF LAW.**

Labor Law §162(2) provides that an employee who works a shift of more than six hours that extends "over" the 11:00 a.m.-2:00 p.m. noon day meal period is entitled to a meal break of at least thirty minutes within that period. Based on the New York State Assembly Memorandum in support of Chapter 350 of the Laws of 1994, by which this language was added, it is this Department's opinion that that the term "over the noon day meal period" means that the hours of labor must extend through the entire 11:00 a.m. to 2:00 p.m. period to trigger the §162(2) requirement for a meal period.

**III. AN EMPLOYEE'S "SHIFT" OR "PERIOD" OF WORK IS DEFINED BY THE  
ACTUAL TIME WORKED AND/OR ENGAGED TO WAIT, NOT THE TIME  
SCHEDULED OR INTENDED FOR SUCH WORK OR WAITING.**

Paragraphs one through four of Labor Law §162 all begin with the phrase "(e)very person *employed* ... shall be allowed ..." (emphasis added). Labor Law §2(7) states that the word "employed," whenever used in the Labor Law, "includes permitted or suffered to work." Given the above-described requirement that laws such as Labor Law §162 must be liberally construed for the benefit of employees, this Department sees no alternative but to interpret that statute as providing that if an employee is "permitted or suffered to work" for an amount of time sufficient to trigger one or more of the mandated meal periods, then such meal period(s) must be provided, whether or not the employer scheduled or intended the employee to work for that amount of time.

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**IV. THE "ONE EMPLOYEE SHIFT" GUIDELINE DOES NOT PERMIT THE ELIMINATION OR WAIVER OF REQUIRED MEAL PERIODS; IT PERMITS AN EMPLOYER AND EMPLOYEE TO CONSENT, UNDER CERTAIN CIRCUMSTANCES, THAT THE EMPLOYEE MAY PERFORM JOB TASKS WHILE EATING AND RESTING.**

According to the "One Employee Shift" guideline set forth on the Department's web page at [www.labor.state.ny.us/workerprotection/laborstandards/employer/meals.shtml](http://www.labor.state.ny.us/workerprotection/laborstandards/employer/meals.shtml):

In some instances where only one person is on duty or is the only one in a specific occupation, it is customary for the employee *to eat on the job without being relieved*. The Department of Labor will accept these special situations as compliance with Section 162 where the employee voluntarily consents to the arrangements. However, *an uninterrupted meal period* must be afforded to every employee who requests this from an employer. (Emphasis added).

As described above, the purpose of Labor Law §162 is to permit workers a period in which they may both eat and rest. Under most circumstances, these cannot both be accomplished if the employee is required to work at his/her job while eating (*see* 29 CFR §785.19). Accordingly, this Department's general interpretation is that an employee must be relieved of all duties during meal periods. The Department recognizes, however, that in certain circumstances (the quintessential example being a convenience store clerk working, alone, the "graveyard shift") it is both impractical for the employer to provide "coverage" during the employee's meal period and possible for the employee to be officially on-duty yet still eat and rest with little or no interruption. Accordingly, the Department's "one employee shift" rule permits, in such circumstances, employers and employees to agree that the employee may remain on-duty while taking a meal period. Please take further note that an employee must "voluntarily consent" to take his/her meal period under such circumstances. Therefore, such "consent" may not be made a condition of employment.

Accordingly, the "one employee shift" guideline does not permit the elimination of meal periods, but, instead, merely permits employees to remain on-duty during their meal periods, thereby being subject to brief interruptions. Under this guideline an employee, such as certain convenience store clerks working in the midnight to dawn hours, may eat his/her meal, make personal telephone calls, read, do crossword puzzles, etc., while still remaining available to perform those job tasks, such as attending to a customer, as might become necessary. In short, this guideline conforms to the letter of §162 by giving employees the required opportunity to eat and rest, while recognizing that the spirit of the statute will be preserved if, in a limited number of specific occupations and circumstances, some brief, irregular, unscheduled interruptions in required meal periods are permitted.

**V. IT IS THE DEPARTMENT'S POLICY TO GRANT PERMITS FOR MEAL PERIODS OF SHORTER TIME THAN REQUIRED, ON THE CONDITIONS, AMONG OTHERS, THAT NO SUCH PERMITTED PERIOD BE SHORTER THAN TWENTY MINUTES, AND THAT THE EMPLOYER**

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MUST PAY WAGES FOR ANY MEAL PERIOD OF ONLY TWENTY MINUTES.

While Labor Law §162(5) authorizes the Commissioner of Labor to grant written permits for shorter meal periods, it is the Department's policy to permit meal periods of not less than twenty minutes "only in special or unusual cases after investigation and issuance of a special permit" (see "Shorter Meal Periods" guideline at the same web address provided above). Furthermore, it is the Department's policy that no permit will be granted for a period of only twenty minutes unless the employer agrees to pay the employees for such shortened meal period. Please note that the agreement to pay wages for the meal period is one prerequisite to the grant of a permit for a period of twenty minutes, not a substitution for such a permit.

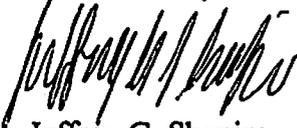
VI. AMONG THE CRITERIA USED TO DETERMINE WHETHER A PERMIT FOR A SHORTER MEAL PERIOD WILL BE GRANTED IS COMPLIANCE WITH THE CRITERIA OF THE ROBERTS DECISION.

In *Matter of ABC v. Roberts, supra* the Court of Appeals set the criteria under which statutorily provided benefits may be waived by an employee or employee organization. Accordingly, this Department takes such criteria into consideration when deciding whether a permit shall be granted pursuant to Labor Law §162(5). Among the *Roberts* criteria are that the waiver be part of a "bona fide agreement by which the employee received a desired benefit" made with "complete absence of duress, coercion or bad faith" (61 N.Y.2d at 249-250). Obviously, the determination of whether these and the other *Roberts* criteria have been met must be made on a case-by-case basis after examination of all relevant facts and circumstances in each particular case. If, for example, an employer unilaterally presented an employee or employee organization with two choices on a "take it or leave it" basis, neither of which choice providing a "benefit" that the union or employees "desired," then a waiver made under such circumstance would not be considered, by this Department, to have met the *Roberts* criteria.

This opinion is based on the information provided in your letter of August 28, 2007. A different opinion might result if the facts provided were not accurate, or if other relevant facts were not provided.

Very truly yours,

Maria L. Colavito, Counsel

  
By: Jeffrey G. Shapiro  
Senior Attorney

JGS:jc  
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