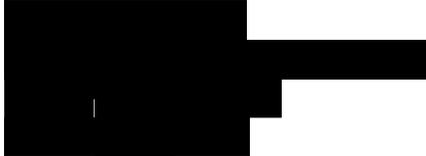




**New York State Department of Labor**  
Andrew Cuomo, *Governor*  
Colleen C. Gardner, *Commissioner*

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January 18, 2011



Re: Request for Opinion  
Meal Periods  
RO-10-0132

Dear [REDACTED]:

This letter is written in response to your letter dated August 23, 2010, requesting an opinion regarding Section 162 of the Labor Law. Your letter states that one of your clients employs delivery drivers and retail store employees who, often times, are working individually and, consequently, cannot be given a meal break. The questions posed in your letter regarding the requirements for employee meal periods set forth in Section 162 of the Labor Law are addressed individually below.

As a preface to our remarks below, please note that the Department is presuming that the employees mentioned above genuinely work in single employee shifts. While you have not disclosed the job duties of the delivery drivers to which you refer (e.g. a person making deliveries of food for a restaurant vs. an individual making package deliveries on a route for an employer), the type of circumstances involved would have a significant effect on the Department's position in this matter. If you are speaking of a food delivery service where only one individual is working a shift, the employee could meet the single person shift requirement but the employer would have to demonstrate that the individual's work load is such that it would be impossible to find an uninterrupted thirty minutes in which to take a meal break. If you are talking about a person who is working a package delivery route on his/her own, that individual would not meet the single employee shift requirement. Arguably, there is no reason why the employee could not take an uninterrupted meal period during the shift other than the employer's or the employee's desire to finish the shift sooner or deliver the packages sooner. This desire is not a sufficient justification to allow the employee to forego a required meal period.

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A similar analysis would apply with regard to retail store employees. In a situation where a store has several departments, each of which is serviced by one employee during a certain shift, that employer does not meet the single employee shift required to justify a waiver of the meal period. Under such circumstances, it is possible that meal periods could be rotated so that each employee could take a meal period while an employee in an adjacent department covers that employee's department as well. Or the employer may be able to hire a floater to cover all department staff while they are on their respective meal periods. The retail sector single employee shift is really intended to cover circumstances where a convenience store, gas station, or similar retail establishment is staffed by one individual during an overnight or other shift and that individual must be available to service customers as needed. The following discussion presumes that your query applies to a justifiable single employee shift.

### **Question 1.**

The first question posed in your letter asks if it is permissible to require an employee to verify, on a time sheet, the number of hours that they worked, with the start and stop time, and initial/sign-off a statement indicating that they took the required meal period. The State Labor Law recordkeeping requirements for timesheets are generally contained in Section 195(4) of the Labor Law which requires employers to establish, maintain, and preserve payroll records showing the hours worked, gross wages, deductions and net wages for each employee, and Section 661 of the Labor Law which requires employers to keep records of hours worked and wages paid by each employee subject to the State minimum wage requirements, along with such "other information" deemed necessary by the Commissioner of Labor. The "other information" is outlined in regulation at 12 NYCRR Section 142-2.6 and includes much of the information required to be kept under Labor Law Section 195(4). Regulation 12 NYCRR Section 142-2.6 specifies that employers are required to establish, maintain and preserve such records for not less than six years.

None of these requirements expressly states that employers must record the actual time that an employee takes a required meal break. Still, it is important to note that the fact that employers are not *required* to record the fact that such breaks were taken does not relieve the employer from his or her obligation to ensure that such breaks were, in fact, taken by the employees and to be able to demonstrate this should an issue arise. In that case, a contemporaneous record of the meal period would go a long way towards proving that one was given. While reporting a meal period on time records does not *conclusively* establish that a meal period was *taken* by the employee, the existence of such records may be accorded some weight should a claim that an employee was not afforded a proper meal period arise and, as such, it is advisable that employers maintain records documenting the time afforded for meals.

### **Question 2.**

The second question in your letter relates to employees that "have consented to have a 'working lunch' by eating on the job without being relieved." Your letter asks: 1) if such consent is required to be in writing; 2) whether such requirement applies for every meal period

consented to be worked through; 3) whether a statement in the employee manual that “[i]n some instances where only one person is on duty or is the only one in a specific location or occupation, it is customary for the Team Member to eat on the job without being relieved” is adequate to establish such consent; or 4) if the additional statement that “Team Members will be afforded an uninterrupted meal period if they request it in writing from their manager” is required. While your question does not specifically reference the Department’s Meal Period Guidelines, those guidelines provide, as relevant to your inquiries, as follows:

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.

As you can see, the guideline’s “one employee shift” exception requires that employees “voluntarily consent” to meal period arrangements for them to be deemed valid by the Department. The facts you have outlined do not involve the giving of consent. They involve notice from the employer being given to the employee indicating that it will be necessary, under certain circumstances, to work through meal periods. The notice does not provide that the employee will be paid for such time nor does it give the employee the opportunity to notify the employer if this is unacceptable and the meal period required by law is requested. Under similar circumstances, the Department has determined that putting an employee on notice of something is not the equivalent of obtaining the employee’s consent to it. For example, notifying an employee that all employees of a company must be paid by direct deposit does not meet the consent requirement of Section 192 of the Labor Law. Accordingly, the statement included in the employee manual is sufficient only if the employer includes additional statement that Team Members are entitled to and will be afforded an uninterrupted meal period if they request it. It is worth noting that employees who are not afforded an uninterrupted meal period are required to be paid for any time spent working and, should an uninterrupted meal period of at least thirty minutes not be provided, all break time must be counted as hours worked, and thus be paid. This fact must also be made clear to the employees in the employer manual or policies.

### **Question 3.**

The third question posed in your letter asks if it is permissible for an electronic payroll system to require that an employee attest to the hours worked and indicate whether or not they took their required meal periods so that the employer can address the employee’s failure to take the required meal period appropriately. Please be advised that nothing in the New York State Labor Law prohibits such a practice.

**Question 4.**

The final question posed in your letter asks if the “uninterrupted meal period” afforded to employees upon request as specified in the “one employee shift” exception in the Department’s Meal Periods Guidelines is required to be continuous and whether such a period can be intermittent if, for example, a customer walks in. Please be advised that such a meal period must be continuous and uninterrupted except as discussed in response to Question 2.

This opinion is based exclusively on the facts and circumstances described in your letter dated August 23, 2010, and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,  
Maria L. Colavito, Counsel

By:   
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Assistant Attorney II

MP  
cc: Carmine Ruberto