



New York State Department of Labor
David A. Paterson, Governor
M. Patricia Smith, Commissioner

October 27, 2008



Re: Request for Opinion:
Meal Periods/Labor Law §162
RO-07-0130

Dear [REDACTED]:

I have been asked to respond to your letter of November 27, 2007. Due to the extremely high volume of opinion requests received by the Department over the past eighteen months coupled with a significant increase in hearings and other time sensitive activities, our response to opinions has been delayed. Please accept my apology for the time it has taken to respond to your inquiry.

Your letter states that you represent a private sector, non-factory employer and asks several questions with regard to time allowed for meals under the New York Labor Law. Please accept the following in response to your request:

Section 162 of the New York State Labor Law provides, in relevant part, as follows:

§162. Time allowed for meals

2. Every person employed in or in connection with a mercantile or other establishment or occupation coming under the provisions of this chapter shall be allowed at least thirty minutes for the noon day meal, except as in this chapter otherwise provided. The noon day meal period is recognized as extending from eleven o'clock in the morning to two o'clock in the afternoon. An employee who works a shift of more than six hours which extends over the noon day meal period is entitled to at least thirty minutes off within that period for the meal period.

3. Every person employed for a period or shift starting before eleven o'clock in the morning and continuing later than seven o'clock in the evening shall be allowed an additional meal period

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of at least twenty minutes between five and seven o'clock in the evening.

5. The commissioner may permit a shorter time to be fixed for meal periods than hereinbefore provided. The permit therefore shall be in writing and shall be kept conspicuously posted in the main entrance of the establishment. Such permit may be revoked at any time.

1. *Is it lawful to offer employees the option of taking a meal break or leaving work earlier at the end of the shift?*

In *Matter of ABC v. Roberts*, 61 N.Y.2d 244 (1984), the Court of Appeals held that a labor union could validly waive the meal period provisions of Section 162 of the Labor Law on behalf of its members where the operational exigencies of the industry made strict compliance with the statutory meal period provisions impractical and the waiver was obtained openly and knowingly, through good faith negotiations in which employees receive significant benefits in return for the waiver, and where the waiver is obtained without duress or coercion. In the first instance, you provide no evidence of the "operational necessities" of the industry in which your client operates that would make strict compliance with the meal period requirement impractical. Please be advised that this Department does not consider a shorter workday to be a significant benefit offered in exchange for the grant of a permit to fix shorter meal periods. Furthermore, your apparent argument that the phrase "be allowed" as used in Labor Law §162(2) should be interpreted to mean that meal breaks are voluntary is contradicted by the Court of Appeal's finding in *Roberts* that "[t]he 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,*" (61 N.Y.2d at 248-249) (emphasis added) and, therefore, that a waiver of such required meal period may only be given when the described criteria have been met. As you have not set forth any grounds for a belief that such criteria have been met, it is the position of the Department of Labor that a waiver of the meal period under the circumstances you describe would not be lawful.

2. *Is it lawful to offer employees the option of taking a meal break or working through the break, if desired by the employee?*

For the reasons set forth above, it is the position of the Department of Labor that a waiver of the meal period under these circumstances would not be lawful.

3. *Are there any exclusions or exemptions to the requirements of New York Labor Law §162? In other words, does Labor Law §162 apply to all employees?*

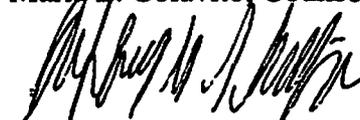
While Labor Law §162(1) refers to "every person employed in or in connection with a factory," Labor Law §162(2) refers to "every person employed in or in connection with a

mercantile or other establishment or occupation coming under the provisions of this chapter.” From this, it is evident that section 162(2) is intended to cover all persons other than those employed in or in connection with a factory. This becomes even clearer when considering Section 162(3), which grants an “additional” meal period to “every person employed” at certain hours. It would be anomalous to refer to an “additional” meal period for persons who were not covered by the noon day meal period provision in the first place. Accordingly, the Department of Labor maintains that the requirements of Labor Law §162 apply to all employees.

This opinion is based on the information provided in your letter of November 27, 2007. A different opinion might result if the facts provided were not accurate, or if any other relevant fact was not provided.

Very truly yours,

Maria L. Colavito, Counsel



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Associate Attorney

JGS:jc

cc: Carmine Ruberto