New York State Department of Labor
David A. Paterson, *Governor*
Colleen C. Gardner, *Commissioner*

April 22, 2010

[redacted]

Re: Request for Opinion
Multiple Rates of Pay
RO-09-0182

Dear [redacted]:

This letter is written in response to your facsimile dated December 16, 2009, in which you request an opinion as to the permissibility of paying an employee a different or lesser rate of pay for different or corrective work performed by the employee. Your letter describes the employer as a plumbing company which generally compensates its employees between twenty-five and thirty dollars per hour. The circumstances presented in your letter are addressed individually below.

1. *A plumber's work on a particular job site results in the need for an immediate or next day recall to repair his defective work. If he is sent back to redo the job correctly, may the employer pay him only minimum wage for his defective work?*

Labor Law §195(1) provides, in relevant part, that "[e]very employer shall *** notify his or her employees, in writing, at the time of hiring of the rate of pay and of the regular pay day designated by the employer in accordance with section one hundred ninety-one of this article, and obtain a written acknowledgement from each employee of receipt of this notice." The Department interprets Section 195 to require advance written notification to employees of any changes in pay and to prohibit retroactive changes in pay. The situation presented in this question proposes having a different rate of pay for all time the employee spends on a recall to repair defective work. So long as that pay rate is clearly and effectively communicated to the employee in compliance with the requirements of Section 195 of the Labor Law and does not impose a retroactive reduction in pay, which is discussed further below, nothing prohibits an employer from paying its employees in the manner in which you describe. Please note, however, that under these circumstances true notice to the employee would arguably require that the employer make it clear which assignments fell into the "recall to repair defective work" category and under what circumstances the alternative wage rate would apply.

2. *If a second man is sent back to redo the job and correct the first man's mistakes, can the first man be paid only minimum wage for his defective work?*

As stated above, Labor Law §195(1) requires that employers provide advance written notice of an employee's rate of pay and designated payday. While employers are free to set an employee's rate(s) of pay, this Department has interpreted Section 195 to prohibit employers from retroactively changing an employee's rate of pay.

Similarly, Section 191 of the Labor law requires the timely payment in full for all hours worked at an employee's agreed-upon wages, and sets forth the frequency of such payments for particular categories of employees.

Section 193 of the Labor Law, which is entitled "Deductions from wages," sets forth the general prohibition on deductions from wages except for in certain limited circumstances, which are enumerated therein. That Section explicitly prohibits deductions from wages except those that are required by law or that are similar to one of the specific purposes set forth in Section 193(b)(1).[1] (*See*, Labor Law §193; *See also*, *Angello v. Labor Ready*, 7 NY3d 579 [2006]; *Marsh v. Prudential Securities, Inc.*, 1 NY3d 146 [2003].) Please note that the New York State Court of Appeals in *Labor Ready* explained payments that go "directly to the employer or its subsidiary violates both the letter of the statute and the protective policy underlying it." (7 NY3d *supra at* 586.) Consequently, it is the Department's opinion that a deduction for defective work is impermissible.

Reading these statutes together, it is the Department's opinion that an employee must be paid for all hours in accordance with the "agreed terms of employment" as identified in the notice provided to the employee under Labor Law § 195(1) when the wages are earned, and any failure to pay such an employee wages such a rate for any time worked would be an illegal deduction from wages. Any retroactive reduction in an employee's rate of pay, regardless of whether the employee receives advanced notice of the possibility of such a reduction, is an illegal deduction from wages since an employee's wages are earned at the time in which the work is performed, not at the time in which the employee is paid.

3. *If an employee travels from Point A to a job at Point B and leaves a piece of the employer's equipment or his bill pad, etc. at Point B, can he be paid only minimum wage to again travel from Point A to Point B to retrieve his jacket?*

This factual scenario is largely indistinguishable from that presented in question one (1) above and is permissible so long as the requirements discussed therein are met.

4. *If an employee travels from Point A to Point B, and leaves a personal belonging such as his jacket on the job at Point B, can he be paid only minimum wage to again travel from Point A to Point B to retrieve his jacket?*

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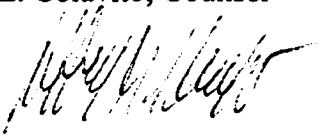
[1] Labor Law §193(1)(b) states that such deductions are limited to payments for "insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States Bonds, payments for dues or assessments for any labor organization, and similar payments for the benefit of the employee."

This scenario is largely indistinguishable from that discussed above in questions one (1) and three (3), and is permissible so long the requirements discussed therein are met.

This opinion is based on the facts set forth in your letter dated December 22, 2009. A different opinion might result if the circumstances outlined in your letter change, if the facts provided were not accurate, or if any other relevant fact was not provided. 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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