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

January 12, 2011

[redacted]

Re: Request for Opinion
Meal Time – One Employee Shift
RO-10-0050

Dear [redacted]:

I have been asked to respond to your letter of March 31, 2010 in which you request an opinion regarding "one employee shift" guidelines to the meal period requirements in Section 162 of the Labor Law. Your letter states that you represent a not-for-profit organization that provides services to persons with intellectual and other developmental disabilities and that these persons live in "Individualized Residential Alternatives" of no more than four beds per facility that are frequently staffed by one employee on each of the day, evening, and night shifts. The meal periods are expected to be interrupted by consumer needs since the employees are alone and there is no feasible or economic way to provide a second staff member.

Labor Law Section 162 sets forth the required meal periods for employees. Labor Law Section 162(1) requires a person employed in or in connection with a factory to have at least a sixty-minute noon day meal. Section 162(2) requires other persons employed in an establishment or occupation under the provisions of the Labor Law to have at least a thirty-minute noon day meal. Section 162(3) requires that all shifts that begin before 11 a.m. and last until after 7 p.m. must include an evening meal break of at least 20 minutes between 5 and 7 p.m. Section 162(4) requires that all shifts of more than six hours starting between 1 p.m. and 6 a.m. be allowed at least sixty minutes if employed in a factory or forty five minutes if employed in any other establishment, at a time midway between the start and end of the shift.

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Section 162(5) provides the Commissioner with the authority to permit a shorter time to be fixed for meal periods than that which is otherwise provided in Section 162 of the Labor Law by granting permits to employers. Pursuant to this authority, the Department has promulgated Meal Period Guidelines which provide a blanket permit for certain situations in which only one employee is working. Those guidelines provide, in relevant part, 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.

With this background in mind, your letter asks whether several scenarios, which are described below, meet the requirements for the "one employee shift" exception. These situations include a (1) day or evening shift assignment where a single employee is present and responsible for providing all necessary services to consumers, (2) an overnight shift assignment where employees are expected to meet the nightly needs of the consumers, clean, prepare meals, and keep various clinical records, (3) assignments out in the community to accompany consumers on appointments, outings, meals, and hospital visits, and (4) respite services when employees relieve consumer's families of their responsibilities in providing care. Please be advised that so long as the consent requirements discussed further below are met, an uninterrupted meal period is afforded to every employee who requests one and the employees are paid for all hours spent working and when not completely relieved, the "one employee shift" exception in the meal periods guidelines is permissible in the circumstances you describe.

Your letter also asks several questions relating to the consent required for the "one employee shift" exception. According to your letter, staff hired before October 26, 2009 were notified of the potential for an interrupted meal through their job description. Employees hired after that date are notified in writing along with their wage and overtime rate in a "new hire" document which the new employees sign. The questions raised in your letter are addressed individually below:

a. *Is the provision of the job description and the employee's acceptance of the job (or continued employment in the job without objection) sufficient to constitute their voluntary consent to the "one employee shift" exception?*

The "one employee shift" exception requires that employees "voluntarily consent" to the meal period arrangements for them to be deemed valid by the Department. The Department interprets that term to require an acknowledgement by the employee, either at the onset of the employment relationship or prior to the time the employee would be expected to forego uninterrupted meal periods, that the nature of the industry in which the employer operates necessitates one employee shifts and that the employee's meal periods may be

interrupted. While mere acceptance of a job or continued employment without objection would be insufficient in this regard, an acknowledgement, preferably in writing, that the job necessitates such an agreement, is deemed by this Department to sufficient under the Labor Law.

b. *Is mention of the typical unavailability of a meal break via the signed new hire document, sufficient to constitute a staff person's voluntary consent to the "one employee shift" exception?*

So long as the mention in the new hire document sufficiently details the unavailability of meal breaks, such a signed, acknowledged notification will be deemed sufficient.

c. *What are the permissible actions my client may take if a staff member consents to the "one employee shift" exception and then retracts the consent? May they be transferred to another position which typically is structured to allow the 30 minute meal break? If no position is available which provides the 30 minute meal break, may they be terminated?*

In order for consent to be valid it must be permitted to be revoked at any time. Section 215 of the Labor Law prohibits an employer from taking any adverse employment action against an employee for asserting his or her rights under the Labor Law. Should a transfer operate as an adverse employment action against the employee, as termination clearly is, the employer would not be permitted to take such an action against the employee should the employee refuse, revoke, or otherwise revise his or her consent to the meal period arrangement. Under the current statute and guidelines, employees who revoke or refuse such consent are protected from retaliation under Section 215 of the Labor Law.

This opinion is based exclusively on the facts and circumstances described in your email request dated March 31, 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
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Assistant Attorney II

cc: Carmine Ruberto