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

February 1, 2011

[redacted]

Re: Request for Opinion
Meal Periods
RO-10-0085

Dear [redacted]:

I have been asked to respond to your letter, dated May 28, 2010, in which you pose three questions regarding your client's (the "Company") current meal period policy as governed by Labor Law Section 162. Your letter states that employees of the Company, a business establishment under Section 162(2), work from 9:00 a.m. to 5:00 p.m. Monday through Thursday, and that, during the winter months, the Friday workday is "somewhat shortened, depending upon the time of sunset, to accommodate the owner and a number of employees who are Sabbath observers." The Company provides its employees a thirty-minute lunch break that must be taken between 11:00 a.m. and 2:00 p.m." The Company requires its employees, through the use of an electronic time clock, to punch in when arriving and to punch out at the end of the work day. This punch in/punch out procedure is also required when employees take their lunch period. The Company's employees are compensated for the total number of hours during which they are punched in.

Your letter states, however, that,

> [s]everal employees do not [take their entire lunch period], however, and punch back in before they have completed their lunch break. They willingly shorten their lunch breaks, with full knowledge of their rights under Labor Law §162 and in the complete absence of duress or coercion on the part of the Company. Those who truncate their lunch periods generally sit at their desks and many resume their regular work.

Against this factual background, you ask three questions which are addressed individually below.

1. *Does the shortening of lunch breaks by employees constitute a permitted partial waiver of employee rights under Labor Law §162 since it does not contravene the statute's legislative purpose, which is the provision of adequate opportunity to eat and rest?*

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Section 162 of the Labor Law covers employee meal periods. 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. The Department of Labor interprets the term "noon day meal" as one that is taken during the period extending from 11:00 a.m. to 2:00 p.m., meaning that the hours of employment must extend through the noon day meal period. An employee must be provided a meal period in all situations where he or she works in excess of six hours, and those hours encompass the period between 11:00 a.m. and 2:00 p.m.

The New York State Court of Appeals, New York's highest court, has held that certain provisions of the Labor Law can be waived by employees or their authorized representatives provided that the waiver or modification does not contravene the legislative purpose of the statute. (*In re American Broadcasting Companies, Inc. v. Roberts*, 61 N.Y.2d 244 (1984).) In *American Broadcasting Companies*, the Court 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: (1) the operational exigencies of the industry made strict compliance with the statutory meal period provisions impractical, (2) the waiver was obtained openly and knowingly, absent of duress or coercion, through good faith negotiations, from which, (3) employees received a desired benefit in return for such a waiver. (*In re American Broadcasting Companies*, 61 N.Y.2d at 249.)

In exchange for a waiver of their evening meal breaks provided by Section 162 of the Labor Law, the employer negotiated, through the collective bargaining agreement, to give the workers extra breaks and an additional extended meal period during other times of the day. The Court held that where there was no express legislative indication that waiver was precluded, "a bona fide agreement by which the employee received a desired benefit in return for the waiver, the complete absence of duress, coercion or bad faith and the open and knowing nature of the waiver's execution" may effectively waive or modify the benefit provided by the statute to the employees. (*Id.* at 249–50.)

Examining the facts, as you have presented them, in light of *American Broadcasting Companies*, it is the opinion of the Department of Labor that the circumstances you describe would not constitute a valid waiver of the meal period under Section 162 of the Labor Law. As such, the Company is required to comply, in full, with the requirements of Section 162 as contained therein and described above.

However, while non-factory workers are not required to be provided a meal period exceeding thirty minutes within the hours described in your letter, the Department will permit factory workers a shorter meal period of not less than 30 minutes as a matter of course, without application by the employer, so long as there is no indication of hardship to employees. Additionally, permits may be issued for both factory and non-factory workers to allow meal periods of shorter than 20 minutes in special and unusual cases. An application for meal period of less than thirty minutes is enclosed in this letter.

2. *If Section 162 of the Labor Law does not permit the shortening of an employee's lunch break under the circumstances set forth above, would the introduction of either or both of the following policy changes regarding meal times permit such shortening:*

   a) The utilization of the "Notice and Acknowledgment"
   b) The posting of the "Notice to Employees"

Your proposal to utilize a form to accomplish such a waiver does not appear to meet the requirements set forth above because it is unlikely that it will be the result of good faith negotiations for which employees receive significant benefits. A waiver form provided by an employer does not, in the opinion of this Department, meet the requirements for a valid waiver of Section 162.

3. *If the changes of policy outlined in Question 2 above are inadequate, what must the Company do to comply with Section 162 of the Labor Law, short of imposing a strict prohibition against employees returning to their desks before the completion of their meal periods?*

As stated above, Section 162(2) requires at least a thirty-minute noon day meal for any employee who works in excess of six hours, and those hours encompass the period between 11:00 a.m. and 2:00 p.m. The Department interprets the term "noon day meal" as one that is taken during the period extending from 11:00 a.m. to 2:00 p.m., meaning that the hours of employment must extend through the noon day meal period.

The Department's general interpretation of this provision is that any time that would constitute "hours worked" may not be counted for purposes of satisfying the meal period requirements in Labor Law Section 162. As such, the section would not require "a strict prohibition against employees returning to their desks before the completion of their meal periods." It is not required that employees leave their workplace for the duration of the required meal period, but that they be given the uninterrupted period to eat and rest. You state in your letter that the employees "who truncate their lunch periods generally sit at their desks and resume their regular work," presumably meaning that they take a short period to eat and then resume their work. If that is the case, then the balance of their meal period during which they resume their duties may not be counted towards satisfying the meal period requirements in Labor Law Section 162.

This opinion is based exclusively on the facts and circumstances described in your request 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,
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MP:mr-l
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