DEPARTMENT OF LABOR
COUNSEL'S OFFICE
345 Hudson Street
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September 26, 2000

Mr. Richard Palmer, President
The Whether Works
724 Columbus Avenue
Mt. Vernon, NY 10550

Re: Request for Opinion, File No. RO-00-0088

Dear Mr. Palmer:

This is to confirm our conversation yesterday concerning whether The Whether Works (TWW) must register under Article 12-A of the Labor Law as a garment manufacturer or contractor.

TWW silk-screens T-shirts, posters, banners, umbrella bags and related sports wear items for customers. The firm buys these items from wholesalers or manufacturers, silk-screens them and then sells them to customers including schools, churches and sports clubs.

You also asked whether these customers are required to register under Article 12-A.

Section 340 (c) of the Labor Law defines "apparel industry" to mean "the making...or otherwise producing...any...apparel ...designed or intended to be worn by an individual which... is to be sold or offered for sale..." Webster's Third New Dictionary (1967) defines "produce" as "to cause to have existence...or make [something] economically valuable..."

Section 340 (d) (ii) defines "manufacturer" as "any person who ... produces in New York state...apparel, designed ...to be worn by any individual which is to be sold or offered for sale..."

As silk-screening T-shirts adds to their value, such activity falls within the definition of the term "producing." Insofar as TWW produces apparel that is intended to be worn by individuals that is offered for sale, it is a manufacturer for

purposes of Section 340 (d) (ii) and must therefore comply with the registration requirements of Article 12-A.

Section 340 (e) defines "contractor" as "any person who... produces in New York state ...apparel, designed to be worn by any individual which is to be sold or offered for sale..."

As your customers only buy but do not produce any apparel, they are not contractors for purposes of Section 340 (e) and therefore do not need to comply with the registration requirements of Article 12-A.

Regarding TWW's silk-screening of posters, banners, umbrella bags, as these items are not intended to be worn by individuals, they are not covered by Article 12-A. However, when TWW's silk-screens related sports wear items, that work is covered by Article 12-A if the items are intended to be worn by individuals.

I trust that this response answers your concerns. In accordance with your request, I am enclosing a copy of Article 12-A of the Labor Law.

Yours truly,

Charles Horwitz,
Senior Attorney

JAT RO-00-0085/0087

STATE OF NEW YORK
DEPARTMENT OF LABOR
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September 25, 2000

Jonathan L. Chait, Esq.
National Labor Relations Board
Region 29
One MetroTech Center North
Brooklyn, New York 11201-4201

Re: Request for Opinion
King Size Laundry, Inc.
29-CA-23578

Dear Mr. Chait:

Your September 18, 2000 letter requests an opinion on the legality of several employment policies.

First, a memorandum dated July 28, 1999 and distributed to employees states that: "effective July 31, 1999 any employee out of uniform will be fine[d]. Should upper management or your district manager view you without a uniform you will be charged $5.00 for the first three (3) times, thereafter you will be charged $10.00."

This policy is unlawful. Section 193 of the Labor Law provides, in pertinent part, as follows:

§ 193. Deductions from wages

1. No employer shall make any deduction from the wages of an employee, except deductions which:

a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or

b. are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises. Such

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authorized deductions shall be 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 to a labor organization, and similar payments for the benefit of the employee.

2. No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section.

A deduction or charge in the nature of a fine or penalty is neither made pursuant to law, rule or regulation nor expressly authorized in writing by employees and for the employees' benefit. Accordingly, it is unlawful.

Second, a memorandum dated July 29, 1999 and distributed to employees states: "If overtime is incurred that will be paid to that employee on a monthly basis."

Section 191 of the Labor Law requires that employers pay various categories of employees at specified frequencies and on regular paydays. Section 190(4) of the Labor Law defines a "manual worker" as "a mechanic, workingman or laborer." The Department of Labor considers laundry workers to be manual workers. Section 191(1)(a)(i) of the Labor Law provides, in pertinent part: "A manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned [...]." Accordingly, this policy is unlawful.

Third, the Employee Handbook states: "There is an unpaid lunch period of one half hour for all full-time employees. You may bring lunch to work with you. Employees are not permitted to leave the store premises during the lunch period."

Section 162(1) of the Labor Law provides that: "Every person employed in or in connection with a factory shall be allowed at least sixty minutes for the noon day meal." Section 2(9) of the Labor Law defines a factory as including "a mill, workshop or other manufacturing establishment where one or more persons are employed at manufacturing, including making, altering, repairing, finishing, bottling, canning, cleaning or laundering any article or thing, in whole or in part [...]" However, the Department's Division of Labor Standards recognizes a thirty-minute uninterrupted meal period as acceptable compliance with the statute.

29 CFR § 785.19 provides, in pertinent part, as follows:

§ 785.19 Meal.

(a) *Bona fide meal periods.* Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any

duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. [Citations omitted]

(b) *Where no permission to leave premises.* It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

Accordingly, this policy is lawful.

Further, your September 22, 2000 letter requests an opinion on the legality of the following practice.

When an employee asks permission for a day off from work, the employee is required to find another employee whose schedule permits him or her to take the place of the employee who plans to be absent. The absent employee then receives a full week's pay as though the absence did not occur, and that employee must then pay the substitute for the extra work the substitute performed. The substitute receives no pay for the extra day's work directly from the employer.

As you correctly note, by requiring that the absent employee pay the wages of the substitute, the employer is unlawfully delegating to the absent employee its responsibility to compensate the substitute, thereby treating the absent employee, in a sense, as an independent contractor. In addition, such a requirement violates Section 193 of the Labor Law.

Further, if the hours worked by the substitute cause him or her to work more than 40 hours in the workweek, the employer's failure to compensate the substitute for overtime work at the proper rate would violate 12 NYCRR § 142-2.2, which provides, in pertinent part, as follows:

§ 142-2.2 Overtime rate.

An employer shall pay an employee for overtime at a wage rate of 1 1/2 times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 USC 201 *et seq.*, the Fair Labor Standards Act of 1938, as amended:; [...] In addition, an employer shall pay employees subject to the exemptions of Section 13 of the Fair Labor Standards Act, as amended, [...] overtime at a wage rate of 1 1/2 times the basic minimum hourly rate. [...] The applicable overtime rate shall be paid for each workweek: [f]or working time over 40 hours [for n]on-residential employees [...].

Finally, if, as you relate, the employer is not only failing to pay for overtime work at the proper rate, but is compensating it in cash without keeping records of the hours worked or the wages paid, such a practice would violate Section 195(4) of the Labor Law, which requires every employer to establish, maintain and preserve for not less than three years payroll records showing the hours worked, gross wages, deductions and net wages for each employee.

I trust that the foregoing is responsive to your inquiry. If you have any further questions, you may contact me at (212) 352-6655.

Very truly yours,

Robert Ambaras

Robert Ambaras
Senior Attorney

bc: Richard J. Polsinello
Opinion File (B & A)
RO-00-0085 & RO-00-0087

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