

August 23, 2010

David Fish, Regulatory Officer
Office of Legal and Regulatory Services
New Jersey Department of Labor and Workforce Development
P.O. Box 110 – 13th Floor
Trenton, N, J. 08625

Re: Use of Time Clocks and “Rounding” Practices, Proposed Rule N.J.A.C. 12:56-5.8

Dear Mr. Fish:

The Employers Association of New Jersey (EANJ) submits the following comments in favor of the Department’s proposed new rule, N.J.A.C. 12:56-5.8, the purpose of which is to enforce New Jersey’s “all hours worked” requirement consistent with federal law. The rule will promote uniformity and predictability between federal and state law. As such, it will foster greater efficiency and productivity during a time of economic distress within the state. Both as a matter of law and policy, the proposed new rule represents a proper exercise of the Department’s rulemaking authority. However, EANJ does seek a clarification to promote consistency and predictability in enforcement.

The Department is proposing to adopt a new rule which would address the use of time clocks and, in particular, the standard practice of “rounding.” This practice typically occurs where time clocks are used and refers to recording employees’ starting or stopping time to the nearest five minutes, or to the nearest one-tenth or quarter of an hour. Regulations promulgated under the Fair Labor Standards Act (FLSA) specifically address the standard practice of rounding. There is no equivalent state rule. The absence of a state rule has caused a great deal of uncertainty regarding the Department’s enforcement of relevant State wage and hour law.

Predictability – the idea that like cases should be treated alike—is a fundamental concept of the definition of justice. The social benefits predictability in the law is so obvious that it should hardly be necessary to list them, but, aside from issues of fundamental fairness, predictability has other advantages. If a result is predictable, settlement is easier: there’s little point in continuing to litigate on either side of a wage dispute, because additional money spent on lawyers cannot change the result. If a result is predictable, one can more easily conform to conduct that is law-abiding. Employers

aren't incentivized to short employees' paychecks to see whether they can get a better deal in a court or before the Department. With a predictable rounding rule, both employers and employees will know where the line is, and employers in particular won't step over it.

The State wage and hour statute expressly authorizes the Commissioner to propose rules to implement the law. N.J.S.A. 34:11-4.11. An administrative rule is "a formal expression or statement of administrative policy effectuating the agency's statutory authority." Metromedia, Inc. v. Div. of Tax, 97 N.J. 313, 328 (1984). It is well settled that administrative agencies have considerable power to carry out the policies and purposes contained in a statute. In the Matter of New Jersey Guild of Hearing Aid Dispensers, 75 N.J. 544, 561-562 (1978). Thus, a proposal for a rule that governs rounding falls within the Commissioner's authority.

To promote the most beneficial social and economic impact, New Jersey's rounding rule should conform to 29 C.F.R. sec. 785.48 (a) and (b), which is exactly what the proposed rule seeks to do. As the proposal sets forth, the proposed new rule would have a positive economic impact upon employers in that having a better understanding of the Department's enforcement policy should help them avoid violating the law, thereby incurring fewer administrative penalties. Further, the proposed new rule affords adequate protection to employees because employees are still required to be paid for all hours worked. While expressly permitting "rounding," the proposed rule still requires that rounding average out so that employees are fully compensated for all the time they actually work. Indeed, rounding must be practiced in such a manner that "it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." Thus, employers will still be required to pay employees for all hours worked and, upon adoption of the proposed new rule, employees would enjoy substantial protection from abuse.

EANJ favors this common sense proposal but we seek clarification on the issue of what constitutes "over a period of time" under the proposed rule when considering whether the rounding has been proper.

This clarification will create even greater certainty for employers and employees, thus reducing the likelihood of inefficient administrative charges or civil litigation.

Respectfully submitted,

John J. Sarno, Esq.
President
Employers Association of New Jersey