



March 16, 2007



VIA FAX AND MAIL



Re: Request for Opinion
Minimum Wage/Spread of Hours
File No. RO-07-0009

Dear [Redacted]

I have been asked to respond to your letters of January 24, 2007 and March 1, 2007, to Commissioner M. Patricia Smith, in which you ask for review of an allegedly erroneous opinion letter dated November 21, 2003. You ask whether this opinion letter represents the "true and accurate opinion" of the Department of Labor, and if not, that a retraction be issued. You also ask for a recalculation of the total wages due and owing under the fact pattern given in such opinion letter. After extensively reviewing this matter, it is the Commissioner's opinion that while your concerns are understandable, the November 21, 2003 opinion letter (hereinafter referred to as "letter") was not intended to, and does not, have any relevance to interpretations of the overtime regulation set forth in 12 NYCRR §142-2.2 and does not contradict that regulation or any applicable case law.

Your concerns arise, in large part, from the letter's mixing of apples and oranges. The letter states that it was intended to provide an opinion "relating to whether an employee qualifies for the spread-of-hours pay pursuant to Title 12 NYCRR Part 142." The letter attempts to answer questions about 12 NYCRR §142-2.4 ("spread of hours"), but includes references to 12 NYCRR §142-2.2 (overtime), without sufficiently distinguishing between the two. To compound the confusion, the letter incorrectly applies the spread of hours regulation.

As explained in detail in the attached opinion letter of April 12, 2006, 12 NYCRR §142-2.4, the subject of the November 21, 2003 letter, requires that on any day that an employee works a "spread of hours" (as defined in 12 NYCRR §142-2.18) he must be paid *at a minimum*: the minimum wage for such hours together with an additional hour of pay at the minimum wage. If, however, the employee's regular wages for those hours worked is equal to or greater than this "spread of hours pay," no additional wages need be paid.

Nothing in 12 NYCRR §142-2.4 affects or contradicts the requirements of 12 NYCRR §142-2.2, which you correctly describe as stating that when an employee works more than 40 hours in any week, each hour worked in excess of forty must be paid at the rate of one and one

half times the employee's regular rate of pay (this correct description being given in footnote 2 of the November 21, 2003 letter).

A major cause of the present confusion arises from the fact that while the determination of whether "spread of hours pay" is due is made on a *daily* basis, overtime pay is calculated *weekly*. As the November 21, 2003 letter attempts to determine, on a weekly basis, whether spread of hours pay is due, the letter is understandably confusing.

In your March 1 letter, you ask the Commissioner to "calculate minimum total wages due (overtime plus base pay)" under applicable law, "and compare the result to the total of base pay + overtime in the 2003 letter," using the fact pattern in the letter. This calculation will be provided below, together with a second calculation for any daily spread of hours pay based upon 12 NYCRR §142-2.4.

In that fact pattern, the employee worked six days per week, twelve hours per day at a regular rate of \$8.00 per hour. Applying 12 NYCRR §142-2.2, the employee should receive forty hours of pay at his regular rate ($\$8.00 \times 40 = \320.00) together with thirty-two hours of pay at one and one half times his regular rate ($\$12.00 \times 32 = \384.00) for a total due and owing of \$704.00.

As an aside, it should be noted that this calculation applies only to an employee not covered by one of the exemptions set forth in §§7 or 13 of the FLSA. According to 12 NYCRR §142-2.2, an FLSA exempted employee is paid overtime, in New York, at a rate of one and one half times the minimum wage (\$7.725 in 2003). Using the above fact pattern, an FLSA exempt employee should be paid for forty hours at his regular rate (\$320.00) plus overtime wages of \$247.20 ($\7.725×32) for a total of \$567.20.

Applying the same fact pattern to 12 NYCRR §142-2.4, we see that on a day in which an employee works a spread of twelve hours, he must be paid at least \$66.95 for that day ($\$5.15 \times 12 + \5.15). As this hypothetical employee's regular daily wage is greater than that amount ($\$8.00 \times 12 = \72.00) (12 NYCRR §142-2.2 applying only to *weekly* wages and therefore being irrelevant to the determination of whether the *daily* spread of hours pay is due), his employer is not required to pay any additional "spread of hours pay."

The confusion caused by the November 21, 2003 letter arises from adding calculations of wages due at the minimum wage (in an attempt to determine whether spread of hours wages were due) to calculations of overtime wages at one and one half times the employee's regular rate (in an attempt to make such determination on a weekly, rather than daily, basis); then adding spread of hours wages even though the amount of the employee's daily wages at his regular rate negated any application of the spread of hours regulation.

In short, the opinions expressed in the November 21, 2003 opinion letter, while erroneously calculating the "spread of hours pay" required by 12 NYCRR §142-2.4, was never intended to interpret 12 NYCRR §142-2.2, and never has been used by the Department, and never should have been, or should be, used in any way, by any person, to interpret overtime wages under the latter regulation. Your letters of January 24, 2007 and March 1, 2007 correctly

describe the regulations and case law applicable to the payment of overtime wages in the State of New York. Please be assured that the Department of Labor has consistently applied such regulations and case law ever since the *Raymus* decision was handed down in 1984.

This opinion is based upon the information provided in your letters of January 24, 2007 and March 1, 2007. A different opinion might result if any facts provided have been inaccurately stated, or if there are other relevant facts which have not been disclosed. If you have any further questions, please feel free to contact me.

Very truly yours,

Jeffrey G. Shapiro
Senior Attorney

JGS:dmm

cc: Carmine Ruberto