



New York State Department of Labor

Eliot Spitzer, Governor

M. Patricia Smith, Commissioner

VIA FAX AND MAIL

June 25, 2007

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

Dear [REDACTED]:

This letter is intended to respond to your letter of March 26, 2007, in which you pose various questions concerning this Department's opinion letter of March 20, 2007, which letter was made in response to your letters of January 24, 2007 and March 1, 2007. Please be advised that except for one clarification, this Department has nothing further to add to the opinion previously provided.

In your prior letters, you alleged that an opinion letter issued by this Department on November 21, 2003 mistakenly applied regulations 12 NYCRR §§142-2.2, 142-2.4 and 142-2.18 and was not in accord with the ruling made in *Claim of Raymus*, 102 A.D.2d 154 (3rd Dept. 1984). You asked for a "retraction" of the 2003 opinion letter, together with a statement that, under the fact pattern set forth therein, the hypothetical employee would be due regular and overtime wages totaling \$704.00. The Department's responding opinion letter of March 20, 2007 explained the errors made in the 2003 letter, confirmed the Department's continuous interpretation of these regulations as in compliance with *Raymus*, and agreed with you that the hypothetical employee should receive wages totaling \$704.00.

The bulk of your response is apparently based upon the statement made in the March 20, 2007 opinion letter that "while the determination of whether 'spread of hours pay' is due is made on a daily basis, overtime is calculated weekly." Somehow, you have interpreted this as a statement of Department policy that spread of hours pay must be paid daily and express the

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opinion that this is an erroneous position on the Department's part. It is difficult to understand how you arrived at this interpretation. As quoted above, the opinion letter merely stated that the "determination" of whether spread of hours pay is due must be made daily while "calculations" of overtime pay are made weekly. Nothing was said or even implied in such letter as to when spread of hours pay and overtime wages must be paid. Please be advised that while the *determination* of whether spread of hours pay is due (*i.e.* has been *earned*) must necessarily be made on a daily basis, such pay must be actually *paid* no less frequently than as required by Labor Law §191.

The remainder of your letter sets forth a number of sweeping statements concerning the alleged relationship between spread of hours and overtime and you repeatedly accuse this Department of misinterpreting the law in various opinions to which you refer. Neither the April 12, 2006 opinion letter to which you refer nor the March 20, 2007 opinion letter was intended to analyze every possible means in which applicable statutes, regulations and case law covering this topic might intertwine or be applied. Rather, the opinions were offered in response to persons (including you) who posed (at least initially) specific questions pertaining to specific fact situations.

There is no statute, ordinance, rule or regulation requiring this Department to issue opinion letters. Rather, they are offered as a courtesy to persons seeking guidance in specific circumstances. They are not intended to be overarching statements of law and policy covering all conceivable situations. They are more analogous to court decisions dealing solely with the issues of a "case in controversy" than to legislative or regulatory provisions designed to be applicable in all situations.

Accordingly, the Department has answered, to the best of its ability, those of your questions that are based on specifically described factual circumstances. The answers already provided remain unchanged. The March 20, 2007 letter and this letter are the Department's full and final response to the questions posed to date.

This opinion is based upon the information provided in your letters of January 24, 2007, March 1, 2007 and March 26, 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.

Very truly yours,

Maria L. Colavito, Counsel

By: Jeffrey G. Shapiro
Senior Attorney