



New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Commissioner

July 15, 2010



Re: Request for Opinion
Janitorial Wage Exception
NYCRR 141
RO-10-0057

Dear [REDACTED]:

I have been asked to respond to your inquiry of April 4, 2010 in which you ask three specific questions regarding the minimum wage requirements for a residential janitor of a building with mixed residential and non-residential units. As part of his compensation, your letter states that the janitor in question received an apartment and utilities. The three questions posed in your letter, all of which relate to the Minimum Wage Order for the Building Service Industry, are addressed individually below.

Question 1 – “Is the ‘residential building’ requirement of the janitorial exemption in 12 NYCRR 141 satisfied where the building in which the ‘janitor’ worked contains a mix of residential and non-residential units, especially given that exemptions are to be strictly construed against the employer?”

Regulation 12 NYCRR §141-1.2 sets forth the minimum rate of pay a janitor may be paid for each unit in a residential building. Although the non-residential units in a mixed residential and non-residential building can hardly be considered “residential units,” Section 141-2.6 anticipates the application of Section 141-1.2 to janitors who live and work in residential buildings with both residential and commercial units insofar as it states that “[j]anitors employed in residential buildings that also include business and/or commercial units shall be paid for the total number of residential, business and commercial units combined. Housing accommodations occupied by employees shall be included in the total count of units.” Accordingly, the residential building requirement of Section 141-1.2 is not defeated by the fact that the building in which the janitor works contains a mix of residential and non-residential units.

Question 2 – “Can an employer under 12 NYCRR 141-2.5 and 141-2.6 credit the value of a janitor’s apartment and utilities that were provided by the employer against the janitor’s minimum

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wages where the employer failed to state or mention these apartment and utility credits/allowances on the statement of wages furnished to the janitor each pay period as required by 12 NYCRR 141-2.2”

Yes. Regulation 12 NYCRR 141-1.5 and 141-1.6 allows allowances for apartments and utilities “furnished by an employer to an employee in a residential building, and occupied by him, [to be] considered part of the minimum wage.” While regulation 12 NYCRR §141-2.2 requires employers of resident janitors to “furnish to each employee a statement with every payment of wages, listing hours worked, rates paid, gross wages, allowances, if any, claimed as part of the minimum wage, deductions and net wages,” nothing in the NY Labor Law limits an employer’s ability to take credit for such allowances after failing to provide such notice. However, Section 196-a provides, in relevant part, that “[f]ailure of an employer to keep adequate records . . . shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid,” or in this case, received the correct wages

Question 3 – “Are workers in the building service industry entitled to spread-of-hours pay under 12 NYCRR 142?”

No. Section 142-1.1 states, in relevant part, that “[this] Part shall apply to all employees, as such term is defined in this Part, except employees who are covered by minimum wage standards in any other minimum wage order promulgated by the commissioner.” Regulation 12 NYCRR Part 141 is applicable to the building service industry, in which your client is employed. Accordingly, the spread-of-hours pay provision in the Minimum Wage Order for Miscellaneous Industries and Occupations is inapplicable to employees within the coverage of the Miscellaneous Wage Order for the Building Service Industry.

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,
Maria L. Colavito, Counsel

By: 
Michael Paglialonga
Assistant Attorney I

MP:lb
cc: Carmine Ruberto

[REDACTED]