



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

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February 25, 2010



Re: Request for Opinion  
Automotive Salespersons  
RO-09-0177

Dear [REDACTED]:

This letter is written to provide you with an advisory opinion relating to our discussion last year regarding the minimum wage requirements for automotive salespersons. That discussion focused on the effects of the recent downturn in the automotive industry. That downturn has led to a situation in which many automotive salespersons are working as many as sixty-five hours per workweek, many of whom have been unable to sell a sufficient number of cars to earn the minimum wage and overtime for the week.

As you know, while automotive salespersons are generally exempted from the overtime requirements of the Fair Labor Standards Act (FLSA), the State minimum wage orders require that automotive salespersons be paid overtime at a rate of not less one and one half times the minimum wage for all hours worked in excess of forty per work week. (*see*, 29 USC §213(b)(10); 12 NYCRR §142-2.2.) However, under the FLSA there is no requirement that wages be paid weekly as long as some regular pay period is established by the employer and the employees receive "prompt payment" for all hours of work within the pay period. (*See*, FLSA Fact Sheet No. 11, "Automotive Dealers under the Fair Labor Standards Act (FLSA).") Furthermore, under the FLSA, periodic draws against commission earnings within the pay/settlement period may be for less than the minimum wage, and employers may credit such draws against their minimum wage obligation when settling the amount due to the employees at the end of the settlement period. (*Id.*) As such, the FLSA permits commissions earned during a different week within a settlement/pay period to satisfy an employer's minimum wage obligations to the employee under the FLSA.

The FLSA expressly provides that states may set standards for the payment of wages that are higher than the standards established by that Act. (*See*, 29 U.S.C. 218.) Under Labor Law

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§191(1)(c), commission salespersons, including automotive salespersons, must be paid in accordance with their agreed terms of employment but not less frequently than once in each month and not later than the last day of the month following the month in which the commission was earned. However, regulation 12 NYCRR §142-2.9 provides that the "minimum and overtime wage...shall be required for each week of work, regardless of the frequency of payment, whether the wage is on a commission, bonus, piece rate, or any other basis." As such, commissions earned by an employee during subsequent weeks within a settlement/pay period may not be used to satisfy the employer's minimum wage and overtime payments to the employee.

For example, consider an automotive salesman who is paid on a commission-only basis with settlement occurring at the end of each month. Should he fail to sell any cars for the first three weeks of the month despite working 40 hours per week (\$290 at \$7.25 per hour minimum wage), but sell five cars earning him \$5,000 in commission in the last week, the commission earned during the last week could not be used to satisfy the employer's obligation in the first week. As such, absent a contrary result set forth in the commission agreement, the employer would be required to pay the employee an additional \$290 for each of the first three weeks, in addition to the \$5000 earned during the final workweek, resulting in the employee earning \$5,870 for the month.

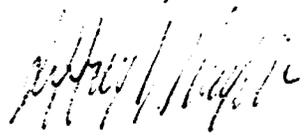
It is additionally worth noting that Section 191(1)(c) of the Labor Law requires that the agreed terms of employment for commissioned salespersons be reduced to writing and signed by both the employer and the employee, kept on file for not less than three years, and be made available to the Commissioner upon request.

If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By:

  
Jeffrey G. Shapiro  
Associate Attorney

JGS/mp

cc: Carmine Ruberto