



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

VIA FAX: [REDACTED]

June 18, 2010

[REDACTED]

Re: Request for Opinion
Compensatory Time
RO-09-0161

Dear [REDACTED]:

I have been asked to respond to your facsimile dated November 13, 2009, regarding the use of compensatory time at a CPA firm during tax seasons so that employees for that firm may "bank" hours for later use. The firm would like to allow employees to accumulate hours during tax season through the use of "comp time" for hourly non-exempt employees at the rate of one and one-half hours for every hour worked in excess of forty hours of "straight time" work. Your letter asks whether there is a way to implement a proper compensatory time policy that is within the wage and hour laws. You also ask whether there are any restrictions for "exempt employees" who work "extra time" to receive compensatory time or whether the CPA firm would be required to categorize that time as a bonus.

Compensatory time in lieu of overtime or, "comp time," is the practice wherein an employee receives future time off, generally at one and one half times the amount worked, for overtime hours worked instead of receiving overtime pay for such hours. As discussed further below, the use of compensatory time in lieu of the payment of overtime may be in violation of New York State Labor Law Articles 6 (Payment of Wages) and/or 19 (Minimum Wage Act) depending on the factual circumstances. Please be advised that although the prohibitions on compensatory time in lieu of overtime in these two Articles are similar, the prohibitions are nevertheless independent of each other.

Labor Law Article 6 (Payment of Wages).

Article 6 of the Labor Law sets forth the requirements for the payment of wages for employees working within the State of New York. "Wages," for the purposes of that Article, are defined in Section 190(1) as follows:

1. "Wages" means the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. The term

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“wages” also includes benefits or wage supplements as defined in section one hundred ninety-eight-c of this article, except for the purposes of sections one hundred ninety-one and one hundred ninety-two of this article.

Overtime pay, as you can see, undoubtedly fits within the definition of wages as it is the “earnings of an employee for labor or services rendered.”

Section 191 of the Labor Law requires the timely payment in full of an employee’s agreed upon wages and sets forth the frequency of such payments for particular categories of employees. For example, manual workers must be paid weekly and not later than seven days after the end of the week in which their wages are earned (Labor Law §191(1)(a)(i)), while clerical and other workers must be paid in accordance with the agreed terms of employment, but not less than semi-monthly, on regular pay days designated by the employer (Labor Law §191(1)(d)). However, Section 191 does not specify a period of time in which an employer is required to pay employees working in a bona fide executive, administrative, or professional capacity earning in excess of nine hundred dollars a week.

Applying the requirements in Section 191 to the practice of utilizing compensatory time in lieu of overtime, nothing in that Section relieves the employer of the obligation to pay an employee’s wages, including any required overtime or hours worked, within the time period allotted. Accordingly, an employee may not be given compensatory time in lieu of the payment of overtime unless the employee is working in a bona fide executive, administrative, or professional capacity earning in excess of nine hundred dollars a week.

Labor Law Article 19 (Minimum Wage Act).

Article 19 of the Labor Law (the Minimum Wage Act) and the regulations adopted thereunder, require that employees be paid at a rate not less than one and one-half times their regular rate of pay for all overtime hours worked. (*see*, Labor Law §650 et seq.; 12 NYCRR §142-3.2.) Employees exempted from overtime coverage by Sections 7 and 13 of the Federal Fair Labor Standards Act (FLSA) are similarly required to be paid overtime, but at a rate not less than one and one-half times the minimum wage rate. (*Id.*) Nothing in Article 19, or the regulations adopted thereunder, permits the substitution of future time off in lieu of the payment of overtime; rather, 12 NYCRR §142-2.2 clearly mandates that “an employer shall pay an employee for overtime.” Article 19, Section 651(5) defines an employee to include any individual employed or permitted to work by an employer in any occupation, but also sets forth fifteen exclusions from that definition. The only exclusion set forth within that definition that might be applicable to a CPA firm is the exclusion for an individual who is employed or permitted to work in a bona fide executive, administrative, or professional capacity.

Accordingly, while compensatory time in lieu of overtime is not prohibited by the New York State Labor Law, its use is limited, by Articles 6 and 19, to the situations in which an individual is neither an “employee” as defined by Article 19 of the Labor Law nor is within the coverage of Section 191 of the Labor Law.

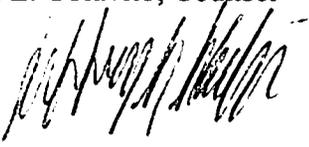
Your second question is unclear to me. As you can see from the discussion above, workers outside of the coverage of Articles 6 and 19 can participate in a compensatory time program. After a reading of the above discussion on the permissibility of compensatory time, should you still have questions in relation to this issue, please provide factual examples so that we will be able to provide you a complete response.

This opinion is based on the information provided in your facsimile dated November 13, 2009. A different opinion might result if the circumstances stated therein change, if the facts provided were not accurate, or if any other relevant fact was not provided. 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