



**New York State Department of Labor**

David A. Paterson, *Governor*

Colleen C. Gardner, *Commissioner*

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July 6, 2010



Re: Request for Opinion  
Compensatory Time  
RO-10-0049

Dear [REDACTED]:

I have been asked to respond to your email request of March 30, 2010, regarding compensatory time for employees working for your company. Your letter states that the employees in question are exempt, salaried employees who work in two public venues, two television studios, and two recording studios in New York City. The employees covered under this policy would include "certainly those making more than \$22,000.00-plus per year," are exempt (presumably from the federal Fair Labor Standards Act), and are not subject to any collective bargaining agreement. Your email asks whether compensatory time (paid time off) can be accrued by your employees in lieu of the payment of overtime.

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), which impose similar and independent restrictions on the use of compensatory time, depending on the factual circumstances.

*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, as relevant to your inquiry, in Section 190(1) as "the earnings of an employee for labor or services rendered..." Overtime pay, as you can see, undoubtedly fits within this definition 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. 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.

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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. Based on the above facts you supplied, the individuals identified in your correspondence who earn less than \$46,800 would fall within the coverage of Section 191 of the Labor Law and would be required to be paid for time worked within the appropriate time frame specified in that Section.

*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.” Section 651(5) of the Labor Law defines the term “employee,” for the purposes of Article 19, to include any individual employed or permitted to work by an employer in any occupation, but also sets forth fifteen exclusions from that definition.

Your letter states that your employees work for a Company involved in media and are exempt. You state that employees earning over \$22,000.00 per year would be allowed to accrue compensatory time. Since your letter does not identify the salaries earned by the individuals referenced in it, we can state with certainty that individuals earning over \$22,000 but less than \$46,800 would be entitled to overtime pay and that the employer’s obligation to pay overtime may not be met by providing compensatory time to such employees. Accordingly, while no opinion can be offered as to whether the employer is prohibited to utilize compensatory time for the employees in question under Article 19, the conclusion that Article 6 prohibits such a practice operates, as mentioned above, independently to prohibit such conduct by the employer.

This opinion is based exclusively on the facts and circumstances described in your email requests dated March 30, 2010 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

MC:MP  
cc: Carmine Ruberto