



New York State Department of Labor
David A. Paterson, *Governor*
M. Patricia Smith, *Commissioner*

April 17, 2008

[REDACTED]

Re: Request for Opinion
Overtime Wages
File No. RO-08-0031
Your File - [REDACTED]

Dear [REDACTED]:

I have been asked to respond to your letter of March 24, 2008 in which you request clarification of previous opinions issued by this Department. These prior opinion letters state, in summary, that New York State regulation 12 NYCRR §142-2.2 requires employers to pay overtime wages of at least one and one-half times an employee's regular rate of pay, except in the case of employees subject to certain exemptions set forth in the Fair Labor Standards Act (FLSA), which employees must be paid overtime wages of at least one and one-half times the applicable minimum wage.

Please be first advised that you have, in general, correctly described the New York State Department of Labor's interpretation of this regulation. It has been this Department's consistent interpretation that if an FLSA exempt employee is paid wages equal to or greater than one and one-half times the applicable minimum wage for all hours worked over forty in a week, then the requirements of 12 NYCRR §142-2.2 have been satisfied. Therefore, if an FLSA exempt employee whose regular rate of pay is equal to or greater than one and one-half times the applicable minimum wage is paid his/her regular rate of pay for all hours worked over forty in a week, then the requirements of 12 NYCRR §142-2.2 have been satisfied, and there is no requirement that such an employee be paid any extra wages beyond his/her regular rate for such overtime.

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Accordingly, the example you propose, in which an FLSA exempt employee whose regular rate of pay is \$15.20 per hour receives such wages "for all hours worked, whether the hours are straight-time or overtime," describes circumstances in which the employee is paid for his overtime in full compliance with 12 NYCRR §142-2.2.

Please be advised, however, that there is one section of your letter in which you do not accurately describe New York State Law, *i.e.* your statement that:

Further, under 12 NYCRR §142-2.2, it appears the employee need only be compensated at the rate of \$10.725 for each hour worked above forty (40) in a workweek, even if his or her "regular rate" for straight-time hours exceeds this figure. Thus, it would be possible under New York law for an employee exempt under Section 13 of the FLSA to receive an overtime rate lower than his or her "regular rate."

Please note that New York State Labor Law §191(1) sets forth various categories of employees, and the time periods within which such employees must be paid. Please note that the statute provides that for each category of workers, wages must be paid "in accordance with the agreed terms of employment." Please further note that New York State Labor Law §193(1) states that "(n)o employer shall make any deduction from the wages of an employee" except under certain limited circumstances described in that statute, none of which circumstances are applicable to the facts provided in your letter.

Reading these two statutes together, it is the Department's opinion that an employee whose "agreed terms of employment" are that he/she receive wages at the regular rate of \$15.20 per hour must receive timely payment of wages at such rate for all hours worked. It is the Department's further opinion that to pay such an employee wages at any lesser rate for any time worked would be an illegal deduction from wages. It is also the Department's opinion that an interpretation of 12 NYCRR §142-2.2 that would result in an employee being paid less for overtime than for straight-time must be rejected as "a construction that would make [the regulation] absurd," (*see* Statutes §145).

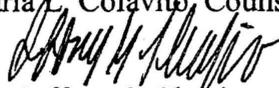
Accordingly, to pay an FLSA exempt employee whose regular rate of pay is \$15.20 at such rate for all hours worked, straight-time or overtime, would constitute compliance with 12 NYCRR §142-2.2, but such employee may not be paid any less than that regular rate for any time worked.

This opinion is based on the information provided in your letter of March 24, 2008, a copy of which is enclosed. A different opinion might result if any facts provided have been

inaccurately stated, or if there are other relevant facts that have not been disclosed. If you have any further questions, please feel free to contact me.

Very truly yours,

Maria L. Colavito, Counsel



By: Jeffrey G. Shapiro
Associate Attorney

JGS: jc
Enc.

cc:



Carmine Ruberto - NYS Department of Labor, Director of Bureau of Labor Standards

[REDACTED]

March 24, 2008

[REDACTED]

VIA FACSIMILE AND U.S. MAIL [REDACTED]

Ms. Maria Colavito
Counsel's Office
New York State Department of Labor
State Office Building Campus
Building 12
Room 509
Albany, New York 12240

Re: Request for Opinion
Calculation of Overtime Under New York Law for Employees of Air Carriers
Who Are Exempt Under the Federal Fair Labor Standards Act

Dear Ms. Colavito:

This letter is to request the opinion of the New York State Department of Labor regarding the proper calculation of overtime payments under New York law for employees exempt from overtime regulations under the federal Fair Labor Standards Act ("FLSA"). I am in receipt of your December 6, 2004 and June 21, 2007 Opinion Letters (see attached); however, I write in request of greater clarification on the method of calculation of overtime payments under 12 NYCRR § 142-2.2.

New York state regulation 12 NYCRR § 142-2.2 provides, in relevant part, that:

An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of Section 7 and Section 13 of 29 U.S.C. 201 et seq., the Fair Labor Standards Act of 1938, as Amended, provided, however that the exemptions set forth in Section 13(a)(2) and 13(a)(4) shall not apply. **In addition, an employer shall pay employees subject to the exemptions of Section 13 of the Fair Labor Standards Act, as Amended, except employees subject to Section 13(a)(2) and 13(a)(4) of such Act, overtime at a wage rate of one and one-half times the basic minimum hourly rate.**

(emphasis added). 12 NYCRR § 142-2.2, therefore, seems to clearly state that no employee subject to exemptions set forth in Section 13 of the FLSA (other than those employees subject to Section 13(a)(3) and 13(a)(4)) need be paid overtime at a rate based upon his or her "regular

[REDACTED]

Ms. Maria Colavito

March 24, 2008

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rate" of pay. Instead, 12 NYCRR § 142-2.2 appears to require only that an employee subject to the exemptions set forth in Section 13 of the FLSA be paid overtime at a rate of not less than one and one-half times the New York state basic minimum hourly rate. Thus, such an employee must only be paid overtime at a rate of at least \$10.725, which represents one hour at the at the current New York state overtime rate of \$7.15, plus \$3.575, which represents an overtime premium of one-half the current New York state overtime rate. Further, under 12 NYCRR § 142-2.2, it appears the employee need only be compensated at the rate of \$10.725 for each hour worked above forty (40) in a workweek, even if his or her "regular rate" for straight-time hours exceeds this figure. Thus, it would be possible under New York law for an employee exempt under Section 13 of the FLSA to receive an overtime rate lower than his or her "regular rate."

For a specific example, assume an employee is subject to the FLSA Section 13(b)(3) exemption from overtime as an employee of a carrier by air subject to the provisions of title II of the Railway Labor Act. Further, assume that the employee is compensated at a rate of not less than \$15.20 per hour for all hours worked, whether the hours are straight-time or overtime. Is it the opinion of the New York State Department of Labor that the employer has fully complied with 12 NYCRR § 142-2.2 by paying the employee a rate of not less than \$10.725 per hour for all hours worked above forty (40) in a workweek despite the fact his "regular rate" of pay exceeds \$10.725 per hour?

We respectfully request an opinion letter as soon as possible regarding whether the above interpretation of the calculation of overtime pursuant to 12 NYCRR § 142-2.2 is correct and whether the calculation for the employee set forth in the example above complies with the New York state overtime regulation.

Sincerely,

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STATE OF NEW YORK
DEPARTMENT OF LABOR
Council's Office

Governor W. Averell Harriman State Office Building Campus
Building #12, Room 509
Albany, New York 12240

December 6, 2004

VIA FAX AND MAIL
[REDACTED]

Re: Request for Opinion
File No. RO-04-0066

Dear [REDACTED]:

In your letter of November 18, 2004, you ask various questions regarding the applicability of certain New York laws and regulations to interstate truck drivers. You describe a situation in which the drivers report to the employer's facility in New Jersey, where they check in and pick up their trucks. They then drive from New Jersey to New York, where they spend their work day delivering products. At the end of the work day the drivers go back to New Jersey where they drop off their trucks and check out for the day. You state that the drivers receive an annual salary of \$45,000.00 and work approximately 50 hours per week. You also state that under no circumstances would a driver work so many hours a week as to make his pay less than one and one half times the basic minimum hourly rate, to wit: \$7.73 per hour.

Based on these facts, you ask: first, whether 12 NYCRR §142-2.2 requires payment of overtime to these drivers; second, whether the employer has an obligation to keep records of the hours worked by these drivers; and, third, whether New York's wage and hour laws are applicable to these drivers.

None but the first of your questions can be answered definitively as you have not provided enough information. New York's laws and regulations apply only to employers with contacts with the State of New York sufficient to allow the State to exercise jurisdiction. You do not describe any such contacts that the employer in this case may have with this State, including but not limited to the operation of any offices for the transaction of business in the State, any

requirements it may have to pay any New York taxes or fees, or the withholding of any portion of any employees wages pursuant to New York laws or regulations. In the absence of any other contacts with the State of New York, mere passage through the State in the course of interstate commerce does not give this Department jurisdiction.

Furthermore, the employer would not be required to pay overtime even if the employer had sufficient contact to allow this State to exercise jurisdiction. 12 NYCRR §142-2.2 requires, first, that although 29 USC §207(a)(1) states that persons employed in interstate commerce shall receive "time and 1/2" of regular pay for all work done over forty hours per week, §213(b)(1) states that such provision shall not apply to any employee governed by 49 USC §31502. This latter provision applies to "motor carriers," and "private motor carriers." If, therefore, an employer meets such definitions, then it need not pay "time and 1/2" of an employee's regular pay for all work done over forty hours per week. 12 NYCRR §142-2.2 requires, second, that an employer who is exempted from paying "time and 1/2" of the employee's regular pay, must still pay one and one half times the basic minimum wage of \$5.15 per hour. In the present case, assuming the accuracy of your statement that the employees' regular salaries are always above such rate, the payment of such a salary is sufficient to meet this second requirement.

This opinion is based on the information provided in your letter of November 18, 2004. 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,


Jeffrey G. Shapiro
Senior Attorney

JGS:



New York State Department of Labor
Elliot Spitzer, Governor
M. Patricia Smith, Commissioner

Opinion file

VIA FAX AND MAIL
[REDACTED]

June 21, 2007

[REDACTED]

Re: Request for Opinion
Overtime - FLSA Exempt Workers
File No.: RO-07-0059

Dear [REDACTED]

I have been asked to respond to your letter of June 13, 2007 in which you allege that there are grounds for a finding that your client's employees are exempt from the provisions of the Fair Labor Standards Act (FLSA) pursuant to the Motor Carrier Exemption (MCE). From this, you state that you disagree with this Department's position that your client's employees are entitled to overtime pay after the first 40 hours worked. Based upon this statement, you question why the Department "would want to question (these employees) or audit their time sheets." You therefore request that the Department refrain from an audit at this time as "unnecessary."

Please be advised that your reasoning is based upon the incorrect assumption that exemption from FLSA overtime requirements is synonymous with exemption from all New York State overtime requirements. Actually, New York State regulations provide that an FLSA exemption merely requires payment of overtime wages at a different rate, not a negation of all obligation to pay overtime.

FLSA §18 (29 USCA §218) provides that a state may interpret its own laws and regulations to provide greater protections and benefits to workers than does the FLSA. New York State regulation 12 NYCRR §142-2.2 provides that an employer shall pay an employee overtime at a rate of one and one-half times his/her regular pay subject to the exemptions of the FLSA. Such regulation goes on to state that "an employer shall pay employees subject to (the FLSA exemptions) overtime at a wage rate of one and one-half times the minimum hourly rate." In other words, employees in New York State who work more than 40 hours per week must be paid for such hours at one and one-half times their regular rate of pay unless they fall into one of the exemptions listed in the FLSA, in which case they must be paid overtime at a rate of one and one-half times the minimum wage.

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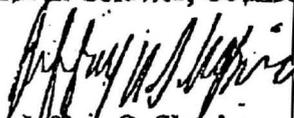
Accordingly, it is not accurate to argue, as you do, that there is no need to pay overtime wages to FLSA-exempted employees. Therefore, even if the employees at issue are subject to the claimed FLSA exemption (and nothing in this letter should be interpreted as an admission or agreement that the MCE is applicable to these employees) the Department is still empowered to investigate conditions at this site, including but not limited to whether payment of overtime wages due is being, and has been, made (see Labor Law §21(2)).

For the above stated reasons, it is the opinion of the Department of Labor Counsel's Office that your request that the Department "refrain from an audit at this time" should be denied. Please advise your client to cooperate with the Division of Labor Standards' investigation of this matter to the full extent required by law and regulation, including but not limited to Labor Law §§25, 26, 31, 32, and 12 NYCRR §142-2.6(d).

This opinion is based upon the information provided in your letter of June 13, 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. If you have any further questions, please feel free to contact me.

Very truly yours,

Maria L. Colavito, Counsel



By: Jeffrey G. Shapiro
Senior Attorney

cc: Carmine Ruberto

JGS: