



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

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June 18, 2010



Re: Request for Opinion  
Overtime – Professional Exception  
RO-10-0012

Dear [REDACTED]:

I have been asked to respond to your email of January 25, 2010 in which you ask whether your File-Test Employees (also designated as Pre-Press Graphic Technicians) could properly be classified as employees working in a bona fide professional capacity under the New York State Labor Law. The File-Test Employees are described in your letter as “subject matter experts for the graphic arts” who do a “variety of prepress operations from repairing and rebuilding files to manually trapping.” Candidates for these positions must have a Bachelor of Science or Bachelor of Arts and a minimum of five years experience in the field. Knowledge of computer software and graphic design is required and the employees’ duties include the performance of file testing, repairing, color calibration and custom file development, as well as other functions. Some creativity seems to be implied in some of the functions, such as in creating logos and miscellaneous files, or in redesigning files for the best print quality.

As a preliminary matter, it is necessary to provide a brief background as to the applicable overtime requirements in New York State. Both State and Federal law require the payment of overtime at one and one half times their regular rate of pay for all overtime hours worked unless the employee in question is exempted or excepted from State and/or federal overtime coverage. Employees that are exempt from the overtime requirements of the Federal Fair Labor Standards Act (FLSA) and the federal overtime requirements, are nevertheless required by State law to be paid overtime at a rate not less than one and one half times the minimum wage rate. Since the FLSA is a federal statute that is within the jurisdiction of the United States Department of Labor (USDOL), it would be inappropriate for this Department to provide an interpretation of the overtime exception regarding which you inquire. A definitive answer to the applicability of that exemption would require that the employer review applicable rules and regulations for that exemption, which are summarized in the enclosed FLSA Fact Sheet. I suggest you contact the USDOL should you need further assistance in that regard.

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For purposes of answering the question from a state law perspective, we will assume that the employees in question have satisfied the requirements under the FLSA to be considered “professionals” and move on to examining whether they would also meet the state law exemption. New York State’s Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR 142-2.2(c)(4)(iii), states that employees that work in a bona fide professional capacity must engage in work:

(a) whose primary duty consists of the performance of work: requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; or original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and

(b) whose work requires the consistent exercise of discretion and judgment in its performance; or

(c) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

The Department will not be guided by job descriptions alone in assessing whether a specific job title would fit within the definition of working in a “bona fide professional capacity” under the State Minimum Wage Orders. Rather, the applicability of such exemptions/exclusions must be determined on a case-by-case assessment of an individual employee’s actual job duties. Based on the information provided, however, the following applies the facts to the requirements of that exclusion.

Section (a) of the above regulation states that work in a bona fide professional capacity requires the employee’s primary duty to include knowledge of an advanced field of science or learning that is frequently acquired by prolonged study and not by apprenticeships, or it includes creativity and originality recognized in the field of artistic endeavors which is created through invention, imagination, or talent of the employee. From the information provided the work described does not seem to fit the final clause regarding creativity based work product. While there is some creativity involved, it is not the primary duty of the employee, given the job description supplied. The Field-Test Employees would therefore have to fit within the definition of the first half of the section, regarding knowledge of an “advanced type in a field of science or learning.” While the work described appears to fit within this because of the advanced knowledge of computer programs and highly specific knowledge needed to work the machines

and the work seems to require some sort of prolonged course of instruction, the likelihood that the work is repetitive in nature causes concern as to the satisfaction of this criterion.

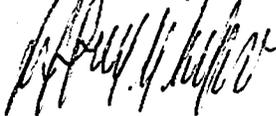
In Section (b) of the above regulation, the employee must exhibit "consistent exercise[s] of discretion and judgment" while performing the work. In other words, the degree of control and independence the employee applies to his/her daily conduct of the job must be great; an employee who regularly reports to a supervisor before performing any action within their duties will have less independence and control than an employee who can freely work without reporting to a supervisor.

Similarly, paragraph (c) requires the work to be "predominantly intellectual and varied in character" and not "routine." In other words, the more freedom and varied the work is, the more likely the employee is a professional. Section (c) also requires that the output produced by the employee be incapable of standardization. In other words, it cannot be applied across employees due to the creativity of the resulting work product. Based on the information provided, it appears that the work done by the File-Test employees does not involve exercise of a lot of discretion, is predominantly routine in nature, does not require the employee to exercise creativity, and is capable of standardization. However, since your letter does not provide a sufficient basis upon which to provide further analysis as to the satisfaction of these criteria, no definitive opinion is offered as this time.

It is worth noting that since your letter indicates that the employees in question are planned to be paid bi-weekly, an implicit issue raised by your question is the frequency of payment of wages required under Section 191 of the Labor Law. Two recently-issued opinion letters discussing the frequency of pay requirements under the New York State Labor Law are enclosed for your review and as guidance in that regard.

This opinion is based exclusively on the facts and circumstances described in your email request dated January 25, 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: Jeffrey Shapiro  
Associate Attorney

JGS:mp:dz

cc: Carmine Ruberto

Enclosures: RO-09-0121; RO-09-0115; FLSA Fact Sheet No. 17d.