



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

July 13, 2010



Re: Request for Opinion
Overtime
RO-10-0034

Dear [REDACTED]:

This letter is written in response to your letter dated March 2, 2010, in which you request that this Department review two job descriptions – Training Coordinator and Performance Improvement Specialist - to determine whether those positions are exempt from overtime.

In making a determination as to the applicability of an exception to or exemption from legally mandated overtime requirements, this Department does not consider an employee's job description; rather it evaluates, on a case-by-case basis, the actual duties performed by such employee since such duties will often differ, sometimes substantially, from such job descriptions. Such a determination is made after an investigation by the Department's Division of Labor Standards. Since no investigation has been made or requested, no definitive determination as to the applicability of the overtime requirements to these particular job titles can be offered at this time.

However, we can offer some non-definitive guidance for your information based on the extensive job descriptions provided in your letter. Based upon this information, it appears that the administrative exemption/exception to the State and Federal overtime requirements could apply to the incumbents of these titles if their actual job duties exactly matched the job descriptions. Following is a further discussion of the underlying legal and factual considerations:

Legal Background

As you may know the FLSA is a federal law enforced by the United States Department of Labor. While this Department does not have jurisdiction over the enforcement of the FLSA, the State Minimum Wage Act and Orders do reference some of its exemptions. However, it is additionally important to note that the FLSA does not prevent the states from enacting wage and overtime laws and regulations that are more beneficial to workers than the FLSA (*see* 29 U.S.C.

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§218; *Manliguez v. Joseph*, 226 F. Supp.2d 377 (EDNY 2002)). Regulations adopted pursuant to the New York State Minimum Wage Act do contain some overtime requirements that apply to employees who are otherwise exempt from overtime under the FLSA. Where the criteria in applicable state regulations (12 NYCRR §142-2.14(c)(4)(ii)) mirror those for the administrative employee exemption in the FLSA, this Department construes the criteria in our regulations in line with those contained in the FLSA, its regulations, and interpretations by the U.S. Department of Labor. Consequently, in order to reach a determination as to whether a job falls under a permitted overtime exemption, the Department must examine both the FLSA and the more stringent provisions of the State Minimum Wage law and orders.

The New York State Minimum Wage Act, which contains the State minimum wage and overtime provisions, generally applies to all individuals who fall within its definition of “employee.” (*see*, Labor Law §651 *et seq.*) Section 651(5) defines “employee” as “any individual employed or permitted to work by an employer in any occupation,” but excludes fifteen categories of workers from that definition. (*see*, Labor Law §651(5)(a-o).) Subpart 2.2 of the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR §142-2.2) provides, in relevant part, that all “employees” must be paid at a rate not less than one and one half times their regular rate of pay subject to the exemptions of the FLSA. Subpart 2.2 also provides that employees exempted under Section 13 of the FLSA must nevertheless be paid overtime but at a rate not less than one and one half times the minimum wage.

One of the FLSA exemptions from both minimum wage and overtime pay otherwise applicable to “employees” applies to individuals employed in a bona fide administrative capacity. To qualify for the administrative employee exemption, all of the following criteria must be met:

- (1) The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- (2) The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- (3) The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Similarly, the definition of “employee” for the purposes of the New York Minimum Wage Act excludes individuals employed or permitted to work in a bona fide administrative capacity. (Labor Law §651(5)(e).) Regulation 12 NYCRR §142-2.14(4)(ii) explains:

- (ii) Work in a bona fide administrative capacity means work by an individual:
 - (a) whose primary duty consists of the performance of office or

nonmanual field work directly related to management policies or general operations of such individual's employer;

(b) who customarily and regularly exercises discretion and independent judgment;

(c) who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (e.g., employment as an administrative assistant); or who performs, under only general supervision, work along specialized or technical lines requiring special training, experience or knowledge; and

(d) who is paid for his services a salary of not less than:

* * * \$543.75 per week on and after July 24, 2009, inclusive of board, lodging, other allowances and facilities.

As previously noted, mere job descriptions are an insufficient basis upon which to evaluate whether individuals in the Training Coordinator and Performance Improvement Specialist titles operate within a "bona fide administrative capacity" under both the FLSA and the State Minimum Wage Orders, since the applicability of such exemptions/exclusions must be determined on a case-by-case assessment of an individual employee's job duties.

Factual Considerations and Application of Law

The job descriptions contained in your letter are for a Training Coordinator and a Performance Improvement Specialist in the administrative services department of [REDACTED]. The full-time (40 hours per week) Training Coordinator earns a salary of \$14.45 to \$21.75 per hour and a full time Performance Improvement Specialist earns a salary of \$17.70 to \$26.75 per hour. The descriptions contained in your letter can be summarized further as follows:

Training Coordinator: The Training Coordinator is responsible for the development, coordination, and implementation of the training and staff development activities. To that end, the Training Coordinator spends 30 percent of his/her time training employees, 30 percent scheduling and tracking employees' training, 30 percent planning for program needs, and 10 percent assessing the training provided by the trainer.

Performance Improvement Specialist: The Performance Improvement Specialist is responsible for oversight and coordination of functions relating to compliance with regulatory requirements and the employer's commitment to excellence. To that end, the Performance Improvement Specialist spends 25 percent of his/her time monitoring or completing work for regulatory compliance, 25 percent providing for safety and security of consumers and/or the workplace, 25 percent on various committee assignments, 10 percent training employees, 10 percent acting as a trained investigator, and 5 percent administering various satisfaction surveys.

With regard to the first criterion in 12 NYCRR §142-2.14(c)(4)(ii) and the second criterion for the FLSA exemption, which require the employee's primary duty to consist of office or non-manual field work directly related to management or general operations, both of the employees in question appear to work in a non-manual capacity and/or performing office work relating to the employer's general operations. The U.S. Department of Labor has interpreted the term "primary duty" to mean "the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." (FLSA Fact Sheet No. 17c.) Based on the information provided in your letter, the first criterion in 12 NYCRR §142-2.14(c)(4)(ii) and the second criterion for the FLSA administrative exemption would likely be satisfied by individuals performing the work as described for both these job titles.

The second criterion in 12 NYCRR §142-2.14(c)(4)(ii), which mirrors the third criteria for the FLSA exemption, also appear to be satisfied since both of the job titles appear to customarily and regularly require the exercise of discretion and independent judgment.¹ Specifically, the Training Coordinator's responsibilities include the development, coordination, and implementation of the training and staff development activities, for which discretion and independent judgment appear to be both customarily and regularly exercised. Similarly, the Performance Improvement Specialist's responsibilities include a number of activities relating to monitoring and completing work for regulatory compliance and quality control, for which discretion and independent judgment appear to be customarily and regularly exercised.

The third criterion in 12 NYCRR §142-2.14(c)(4)(ii), which does not have a corresponding FLSA exemption, appears to be satisfied as the employees both appear to work in a bona fide administrative capacity, based upon the nature of the totality of their job duties. While such a classification is not dispositive, the fact that the employees are employed in the

¹ The U.S. Department of Labor has provided guidance in evaluating the "discretion and independent judgment" criterion that is consistent with the approach taken by this Department in evaluating the corresponding State criterion. As relevant to the present inquiry, the "discretion and independent judgment" criterion should be evaluated in line with the following:

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee's decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

employer's "administrative services" department appears to support the conclusion that the employees' are employed in such a capacity.

Finally, while the fourth criterion in 12 NYCRR §142-2.14(c)(4)(ii) and the first in the FLSA exemption, which impose minimum salary requirements, appear to be satisfied based upon the salaries described, it is important to note that the fourth criterion requires that the employees be paid a *salary* for their work. While your letter provides salary ranges in dollars per hour, so long as the employees in question are not paid an hourly wage for their work, the ranges described in your letter, when calculated as a salary, satisfy the requirements of the fourth criterion.

Accordingly, while a definitive determination cannot be made in every instance to the employees referred to in your letter as to the applicability of the administrative exclusion in the State Minimum Wage requirements and the administrative exemption from the FLSA, the employees described in your letter appear to satisfy those requirements and, consequently, are not entitled to overtime pay.

This opinion is based exclusively on the facts and circumstances described in your request 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

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