



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

December 2, 2009



Re: Request for Opinion
Frequency of Payments
RO-09-0115

Dear 

This letter is written in response to your undated letter which was received by this Department of Labor on August 4, 2009. Your letter states that office workers and professionally licensed hairdressers and barbers employed at your company have requested to change to a bi-weekly payroll and those employees "consider themselves to be professional employees." In your letter you ask whether those workers may be paid bi-weekly instead of weekly.

Section 191 of the New York State Labor Law sets forth the rules which dictate how frequently an employee must be paid. As it is relevant to your inquiry, "manual workers" must be paid on a weekly basis, while "clerical and other workers" must be paid according to the terms of their employment agreement as set forth at the outset of their employment and not less than semi-monthly. A company may apply for permission to pay manual workers bi-weekly if the company had an average of one thousand employees in New York for the three years preceding the application, or if the company had an average of three thousand out of state employees for the three years preceding the application and an average of one thousand employees in New York for the year preceding the application

As relevant to the barbers and hairdressers, Section 190(4) of the New York State Labor Law defines a "manual worker" as "a mechanic, workingman or laborer." That term, by its definition and the Department's interpretation of the statute, extends beyond what the general public might consider to be a manual worker to generally include individuals who spend more than twenty five percent of their working time engaged in "physical labor." Additionally, the Department interprets "physical labor" to broadly include countless physical tasks performed by employees. This interpretation is in line

Tel: (518) 457-4380, Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

with the instruction of the New York Court of Appeals providing that the Labor Law should be read broadly in favor of worker protections (*See, Red Hook Cold Storage Co. v. Department of Labor*, 295 N.Y. 1 (1945)).

To make a definitive determination as to whether an employee may be deemed a "manual worker" under Section 190(4), the Department would need to conduct an investigation to determine the actual duties of the employee(s) in question. The results collected from that investigation would then be applied to the ordinary and usual meaning of the applicable statutory terms. While a definitive determination may not be made without an investigation, the duties typically performed by a barber or hairdresser customarily place such workers exclusively under the category of "manual workers," thereby requiring them to be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned. (Labor Law §190(1)(a)(i).)

With regard to the office workers, Section 190(7) of the New York State Labor Law defines a "clerical and other worker" as "employees not included in subdivisions four ("manual worker"), five ("railroad worker"), and six ("commission salesman") of Section 190, except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of six hundred dollars a week." Under Section 191(1)(d) of the New York State Labor Law "a clerical and other worker shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer."

As stated above clerical and office workers must be paid in accordance with the terms (the designated pay days) of employment to which they agreed to at the outset of their employment unless the employer changes the pay period to a different one permitted by law. Whether an office worker may be deemed a "clerical and other worker" under Section 190(7) depends on the actual duties of the office worker(s). To determine whether an employee is a "clerical and other worker" the Department would need to ascertain from the employees what their actual duties are. However, based on the typical duties of an employee with the job title in question it is the opinion of the Department that an office worker would be deemed "clerical and other worker" under Section 190(7); therefore, the office workers should be paid according to the terms which they agreed to upon their hiring as required by Section 191(1)(d) of the Labor Law. If the office workers agreed to be paid weekly upon their hire then they should be paid weekly.

In regard to whether "professionally licensed" barbers and hairdressers may be considered professionals, the criteria for determining whether an individual may be deemed a professional under New York State Labor Law may be found in 12 NYCRR Section 142-2.14 (4)(iii)¹. Under Subdivision (4)(iii)(a) a professional is defined as one "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

¹ The criteria set forth in 12 NYCRR 142-2.14 is set forth for the purposes of determining if the workers are bona fide professionals for the purposes of Article 19 of the Labor Law.

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, 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 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.”

Based on the foregoing criteria and the Department’s longstanding interpretation of the term “physical labor” expressed above, it is the opinion of the Department that barbers and hairdressers are not likely to fit within the definition of “employed in a bona fide...professional capacity” under Article 6 of the New York State Labor Law. Such workers, while working in what is an undoubtedly skilled profession, are not engaging in original or creative work in a recognized field of artistic endeavors nor have they engaged in a prolonged course of specialized intellectual instruction or study in order to obtain their license.

It is additionally worth noting that while certain employers of manual workers may apply to the Commissioner of Labor for authorization to pay its employees bi-weekly or semi-monthly, nothing in your letter indicates that [REDACTED] qualifies for such an authorization since it appears to have less than one hundred employees, far below the thresholds for such an authorization. Accordingly, based on the facts set forth in your letter, the barbers and hairdressers referred to therein must be paid not less frequently than weekly as prescribed by Section 191 of the Labor Law.

This opinion has been provided on the basis of the facts set forth in your letter of August 4, 2009. A different opinion might result if the circumstances outlined in your letter 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

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