Opinion Ltr

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

July 11, 2007

[redacted]

Re: Request for Opinion
Overtime - Companions
File No.: RO-07-0069

Dear [redacted]

I have been asked to respond to your letter of June 29, 2007 in which you ask numerous questions regarding payment of overtime wages to employees that you describe as "companions." You ask these questions in light of the recent decision of the Supreme Court of the United States in the matter of *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007). Unfortunately, you do not provide enough information for a definitive answer to all of your questions.

In answering your questions it is first necessary to review both the Supreme Court's decision in *Coke*, the differences between federal and New York State regulations, and the effect of this decision and these differences on your business.

You describe the *Coke* decision as stating "that home care workers are excluded from overtime protection." This is not an accurate description of the decision. First, the term "home care worker" is not used in the *Coke* decision, nor in New York State Law. Also, the *Coke* decision merely affects the payment of minimum wages and overtime wages to certain employees pursuant to the federal Fair Labor Standards Act (FLSA). It has no effect, however, on the payment of minimum wages or overtime wages to those employees pursuant to state laws.

In *Coke*, the Supreme Court considered a lawsuit brought by a domestic services worker against her former employer alleging that she was not paid required minimum wages and overtime wages. The Supreme Court's decision was made in light of a provision of the FLSA which exempts from FLSA minimum wage and overtime requirements "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the [U.S.] Secretary [of Labor]," (29 U.S.C. §213(a)(15)). The Court considered

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

www.labor.state.ny.us bcejjs@labor.state.ny.us

the fact that although one federal regulation included in this exemption "companionship" workers who are employed by a person or business other than the family or household of the person being cared for (29 CFR §552.109(a)), another regulation defined "domestic service employment" only as work done in the home of the employer (29 CFR §552.3). The worker in *Coke* argued, based on the second regulation, that as the work was not performed in the home of her employer - a business providing domestic workers to clients - but, rather, in the home of the client, the FLSA exemption did not apply to her. The Court held, for reasons irrelevant to your questions, that the first regulation was binding and that when employees of a business provide domestic services to clients in the clients' homes, such employees are "domestic service employees" exempt from the FLSA requirement for payment of minimum wages and overtime wages.

However, the fact that an employee is FLSA exempt does not absolve an employer of the responsibility to comply with similar state requirements. The FLSA itself states that nothing in it excuses noncompliance with any state law regarding minimum wage or overtime (29 U.S.C. §218(a)). As one Court held, the FLSA does not "pre-empt state regulation of wages and overtime if the state's standards are more beneficial to workers," (*Manliguez v. Joseph*, 226 F. Supp.2d. 377, 388 (EDNY 2002).

New York State Labor Law §652(1) states that all employers shall pay at least the State minimum wage to all "employees." The State's definitions of "employee" are set forth in law at Labor Law §651(5) and in regulation at 12 NYCRR §142-2.14. Also, New York State regulation 12 NYCRR §142-2.2 states, in summary, that all employers shall pay overtime at a rate of one and one-half times the employee's regular rate of pay, unless the employment is covered by one of the FLSA exemptions, in which case the employer shall pay overtime at the rate of one and one-half times the minimum wage. Therefore, if a worker is an "employee" as defined by New York State law, then he/she must be paid the State minimum wage whether or not he/she is an FLSA-exempt employee. Also, he/she must be paid overtime at a rate of one and one-half times his/her regular rate of pay, or at one and one-half times the minimum wage if he/she is covered by one of the FLSA exemptions.

Therefore, the answers to many of your questions depend on whether your workers are "employees" as defined in New York State law. Unfortunately, you have not provided enough information for a determination of this issue. The only information you have provided regarding your business, its workers, and their duties is that "[redacted] provides 'companion' level home assistance to primarily seniors. Our services are more practical than skilled and include such tasks as housekeeping, laundry and meal preparation. We are not a licensed company."

New York State law excludes "companions" from its definition of "employee." The term "companion," is defined as "someone who *lives in the home of an employer* for the purpose of serving as a companion to a sick, convalescing or elderly person *and whose principal duties do not include housekeeping*," (12 NYCRR §142-2.14(c)(1)(ii)). (Emphasis added). In this case, you have not stated whether your workers provide service on a "live-in" basis. Also, although you have admitted that your workers' duties "include" housekeeping, you do not provide any information on which it could be determined that housekeeping is or is not one of their "principal duties." Therefore, although your workers might be excluded from the FLSA definition of "employee," you have not provided enough information for a determination as to whether they are excluded from New York State's definition of that term.

With these facts in mind, the answers to your questions are as follows:

1. *Would my employees (companions) be classified as home care workers?*

Leaving aside the fact that "home care worker" is not a recognized term under either the FLSA or New York State law, you have not provided enough information for an answer to the relevant question, as described above -- whether your workers are "companions" excluded from New York State's definition of "employee."

2. *Would companions, as compared to home health care aides, also be exempt from overtime protection or would* [redacted] *be required to pay them overtime wages?*

See answer to question 1, above.

3. *If* [redacted] *is required to pay our companions overtime wages, what is the formula (i.e. time and a half of their prevailing rate or time and a half of the minimum wage)?* [redacted] *incidentally, pays our companions time and a half of their prevailing wage.*

The answer to this question, as described above, depends on whether a worker is covered by an FLSA exemption and by the definition of "companion" in New York State law. If the worker is FLSA exempt, but not a "companion" as defined by New York, then he/she must be paid overtime at one and one-half times the minimum wage.

4. *Are we required to pay "spread" wages or is this also exempt?*

Spread of hours wages are required only by New York State regulations. Whether or not an employee is FLSA exempt is irrelevant to the question of whether an employee must be paid spread of hours wages. Spread of hours wages must be paid to all "employees" in New York State. In this case, once again, a worker meeting the definition of "companion" is not an "employee" and, therefore, need not be paid spread of hours wages.

5. *If we are required to pay "spread wages," what is the formula?*

Enclosed please find a copy of an opinion issued by this Department on April 12, 2006 explaining spread of hours pay,

6. *If our companions are exempt from overtime protection, is it discretionary for [redacted] to pay overtime wages?*

If a worker is both FLSA exempt and a "companion" as defined by 12 NYCRR §142-2.14(c)(1)(ii), then there is no obligation in federal or State statute or regulation to pay overtime wages. If, however, [redacted] has made a contractual arrangement with its employees to pay overtime wages, or if its actions have constituted the creation of a contract, the terms of that contract may be enforceable. I suggest that you contact the private attorney of your choice for a determination as to whether such a contract exists.

7. *If we have been paying our companions overtime wages, in light of the decision, can we cease this practice?*

See answer to question 6, above.

8. *If the decision is reversed some time in the future, would home care companies be required to retroactively pay overtime wages to their employees? Would that possibility apply to my company?*

As *Long Island Care at Home, Ltd. v. Coke* was a decision of the Supreme Court of the United States, it is not possible for that decision to be "reversed." The only ways the legal effect of *Coke* could change would be: if the U.S. Congress amended the relevant portions of the FLSA; if the U.S. Department of Labor amended the regulations on which the *Coke* decision was based; or if the Supreme Court addressed this issue in a different manner in a later case. Furthermore, whether any such changes would require retroactive pay or be applicable to [redacted] would depend on the specific changes made. Therefore, it is not possible to answer this portion of your question at this time.

9. *What is the actual date of this decision?*

June 11, 2007.

10. *If my company has been paying our companions overtime wages and we are not legally required to pay them for their overtime and our clients are billed extra for hours over 40 (clients are informed of this policy prior to commencing services) in light of this decision, can a client legally request a refund for their past overtime payments?*

This question can only be answered by interpretation of the contract that [redacted] has with a client. The Department of Labor cannot provide such an interpretation. I suggest that you contact the private attorney of your choice for the answer to this question.

This opinion is based on the information provided in your letter of June 29, 2007. A different opinion might result if the facts provided were not accurate, or if any other relevant fact was not provided.

Very truly yours,

Maria L. Colavito, Counsel

By: Jeffrey G. Shapiro
Senior Attorney

JGS:
Enclosure
cc: Carmine Ruberto