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

December 9, 2010

[redacted]

Re: Request for Opinion
Independent Contractors
RO-10-0098

Dear [redacted]:

I have been asked to respond to your letter, dated June 23, 2010, in which you ask whether an individual would be determined to be an employee or an independent contractor. You indicate that a New Jersey company, with no office or inventory in New York, "drop ships" product to customers whose business are in New York. A New York resident will occasionally refer a customer to the New Jersey company and is paid a commission on any sale. The New York resident has a full-time unrelated job in New York and does not go to the New Jersey company's place of business.

Unfortunately, your letter does not provide sufficient information to make a determination. However, below please find an outline of the standards used for determining whether an individual is engaged as an independent contractor or as an employee under New York State and Federal Law.

The New York State Labor Law does not define the term "independent contractor." Therefore, there are no statutory means by which one may differentiate independent contractors from employees. However, it is well settled under New York case law that the "determination of whether an employer-employee relationship exists rests upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results." (*Bhanti v. Brookhaven Memorial Hospital Medical Center, Inc.*, 260 A.D.2d 334, 335 (2nd Dept. 1999).) A contract that provides that the alleged employee is an independent contractor is not determinative in establishing that the employee is an independent contractor since such a determination requires an examination of the actual course of conduct between the two parties. (*See, Matter of Webley*, 133 A.D.2d 827 (3rd Dept. 1987).)

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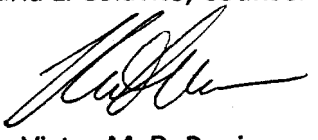
The Supreme Court of the United States has phrased the "central inquiry," in applying the Fair Labor Standards Act to this question, as "whether the alleged employer possessed the power to control the workers in question . . . with an eye to the 'economic reality' presented by the facts of each case." (*Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961), quoted in *Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d. 327, 342 (S.D.N.Y. 2005).) The Courts have set forth many factors to consider when examining the "economic realities" of a situation. (*See, Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1054-1059 (2nd Cir. 1988); *Zheng v. Liberty Apparel Company, Inc.*, 355 F.3d 61, 67 (2nd Cir. 2003).)

Therefore, since your letter does not provide a sufficient factual basis upon which the factors enumerated above can be applied, under both the Federal and State lines of cases, no definitive opinion may be rendered at this time regarding the status of the individual referred to in your letter. If, after reviewing these cases, you wish to send us more detailed information regarding the relationship between the New York individual and the New Jersey company with respect to the indicia of control mentioned in the case law, we will be better able to render an opinion in the matter.

This determination is based exclusively on the facts and circumstances described in your letters dated June 23, 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 letters and email 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: Victor M. DeBonis
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