



**New York State Department of Labor**

David A. Paterson, *Governor*

M. Patricia Smith, *Commissioner*

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March 26, 2008

Re: Request for Opinion  
Non-profit exemption  
File No.: RO-08-0022

Dear [REDACTED]:

I have been asked to respond to your letter of March 5, 2008 in which you state that you represent employees of a non-profitmaking institution which asserts, in a pending Supreme Court action, that it is entitled to an exemption from minimum wage orders pursuant to Labor Law §652(3)(b). You state that the present employer did not file the required certification, but that such a certification was filed by "the employer's parent." You ask whether the current employer may claim an exemption under these circumstances. Please be advised that you have not provided enough information for a response to this question.

Your question may only be answered by a determination that the entity that filed the certification is or is not the same entity that now seeks the exemption. This is not a question of law but one of fact (*e.g. Lihli Fashions Corporation, Inc. v. National Labor Relations Board*, 80 F.3d 743 (2nd Cir. 1996)). In this case, you have provided no information on which the Commissioner of Labor may make such a factual determination.

Furthermore, the Commissioner cannot make such a factual determination based only upon the representations made by a single party in ongoing litigation. If you wish the Commissioner to make such a determination, you must provide all factual information relevant to the four-part test set forth by the Supreme Court of the United States in *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965). You must also provide the names and addresses of the attorneys representing the current employer and the "parent" so that relevant facts may be elicited from them and so that copies of the Commissioner's resulting determination and opinion may be sent to them.

If you have any further questions on this matter, please feel free to contact me.

Very truly yours,

Jeffrey G. Shapiro  
Associate Attorney

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cc: Carmine Ruberto.

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