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

January 15, 2009

[redacted]

Re: Request for Opinion
Travel Pay
RO-09-0170

Dear [redacted]:

This letter is written in response to your letter dated November 24, 2009, in which you request an opinion as to the pay requirements for travel time under regulation 12 NYCRR §142-2.1. Your letter asks a number of questions relating to the requirements for travel pay under that regulation. Those questions, to the extent possible based on the limited factual information provided in your letter, are addressed individually below.

1. *Does the New York Department of Labor share the federal law's [Portal to Portal Act] approach in determining whether such travel time [that which is spent traveling after[1] non-work hours on a train, plane or bus] is compensable?*

As mentioned by you in your letter, State regulation 12 NYCRR §142-2.1 requires, in relevant part, that the minimum wage be paid for "time spent in traveling to the extent that such traveling is part of the duties of the employee." The federal Portal to Portal Act (29 USC §251 *et seq.*) is a federal law which amends the provisions of the Fair Labor Standards Act (FLSA) in relation to travel and other activities before and after the workday. (61 Stat. 84.) However, Section 18(1) of the Fair Labor Standards Act provides that nothing in that Act excuses noncompliance with any state law regarding minimum wage or overtime. (*see* 29 USC §218(a).) That provision has been interpreted so that the Fair Labor Standards Act does not "pre-empt state regulation of wages and overtime if the state's standards are more beneficial to workers." (*see, Manliguez v. Joseph*, 226 F.Supp.2d. 377, 388 (EDNY 2002).) Therefore, to the extent that the New York State Labor Law provides additional benefits to employees, i.e. deeming travel time to be time "worked," the enhanced benefit provided by the New York State Labor Law controls.

[1] Although your refer to time spent traveling "after non-work hours," it appears that you intended to say during non-work hours or after work hours.

With regard to travel time after work hours or during non-work hours, the New York State Department of Labor interprets the quoted language in regulation 12 NYCRR §142-2.1 in line with federal regulation 29 CFR §785.35, which provides, in full:

> An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

While this Department follows the above regulation, without a specific factual inquiry upon which to evaluate whether the applicable provisions of the New York State Labor Law are consistent with or in line with all of the provisions and regulations of the Portal to Portal Act under all circumstances, no conclusive opinion can be made.

2. *[D]oes the phrase "to the extent that such traveling is part of the duties of the employee" apply only to employees who travel extensively within the state as part of their job duties, and, if so, what percentage of the employee's time must be spent traveling to qualify as "extensive" travel? Or, does this phrase also apply to employees who travel less frequently for their work?*

The phrase "time spent in traveling to the extent that such traveling is part of the duties of the employee" does not turn upon the extent of an employee's travel, as your question assumes; rather, the phrase "to the extent that" is used in that regulation to mean that the minimum wage must be paid for all travel time that is within the duties of the employee and not for travel time that is not part of their duties. Otherwise stated, that phrase requires that employees be paid for all travel time that is part of their duties as an employee. Therefore, in direct response to your question, the above-quoted phrase from regulation 12 NYCRR §142-2.1 applies to all employees, regardless of the extensiveness of their travel, and requires the payment of wages for any travel that is part of the duties of the employee.

3. *[W]ould the New York Department of Labor consider traveling as part of the employee's duties if the employee, who is assigned to the employer's main office in New York, travels only once per year to an in-state seminar at the request of the employer?*

Federal regulation 29 CFR §785.27 provides as follows:

> § 785.27 General.
> Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
> (a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;
(c) The course, lecture, or meeting is not directly related to the employee's job; and
(d) The employee does not perform any productive work during such attendance.

Unfortunately, the question posed in your letter does not provide a basis upon which to evaluate whether the four criteria contained in the above regulation are met. (*see also,* 29 CFR §785 subpart C.) However, based on the fact that your letter states that the travel was "at the request of the employer," it appears that the criterion which requires that attendance be voluntary was not met. It is worth further noting, as stated above, the State is not preempted from enacting provisions more protective of employees than those contained in the FLSA and its regulations, it is not necessary to determine whether regulation 12 NYCRR §142-2.1 provides such further protection since an evaluation of whether the baseline federal standard has been met cannot be rendered under the limited facts provided. If after a review of the above-quoted regulation and those within Subpart C of 29 CFR §785 you require further clarification, please do not hesitate to respond to this letter with any further questions you may have.

4. *Would the analysis change if the employee traveled out of state for the seminar at the employer's request?*

Since the above analysis is substantively limited to the provisions and regulations of the FLSA, a federal law, the above analysis is unaffected by the additional fact that the employee traveled out of state for the seminar.

This opinion is based on the information provided in your letter dated December 3, 2009. A different opinion might result if the circumstances stated therein 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

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JGS:mp
cc: Carmine Ruberto