



New York State Department of Labor

David A. Paterson, Governor

M. Patricia Smith, Commissioner

February 24, 2009

[REDACTED]

Re: Request for Opinion
On Call Time
RO-08-0119

Dear [REDACTED]:

This letter is written in response to your letters of September 4 and September 10, 2008 in which you state that you work for a not-for-profit organization, [REDACTED], that helps people with developmental disabilities find jobs, establish their own homes, and become involved in community life. Your letter states that [REDACTED] is in the process of hiring an employee, who you characterize as "non-exempt," to work 35 hours per week as a job developer. You state that, "in addition," you "would like" this person to be a paid roommate for two of your participants. As such, she would be required to be present with these participants in an apartment provided by [REDACTED] for five nights per week from 10:00 pm to 6:00 am and would be permitted to sleep during that time unless the participants needed assistance. These two positions would be performed at different locations. You propose to pay this employee \$38,000 per year for both the thirty-five hours per week as a job developer and for five hours per week in the "paid roommate" position.

On these facts you pose two questions: whether you are required to pay this employee for the time spent sleeping during the hours as a paid roommate; and, if so, must these sleeping hours be paid as overtime. The answers to both questions are: "generally no, but overtime may have to be paid under certain circumstances."

Federal Regulation 29 CFR §785.23 provides that:

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (*Skelly Oil Co. v. Jackson*, 194 Okla. 183, 148 P. 2d 182 (Okla. Sup. Ct. 1944); *Thompson v. Loring Oil Co.*, 50 F. Supp. 213 (W.D. La. 1943).)

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It is this Department's long-standing interpretation of law that a residential employee is not deemed to be working during her normal sleeping hours, i.e. eight hours per day. As you state that the paid roommate position requires this employee to be on the premises for eight hours per day, seven of which may be spent sleeping (your work schedule anticipates one hour of assistance per night), those seven hours will not be considered to be working time for which the employee must receive any payment, overtime or otherwise.

Please be advised, however, that there are certain provisos to the foregoing paragraph. First and foremost, if the scheduled sleeping time is interrupted by a call to duty (as you put it - "unless she is called upon to help one of the participants") then all time spent in such interruption will be considered time worked. Second, the employee must usually be able to enjoy an uninterrupted night's sleep. It is this Department's policy that if the sleeping period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, then the entire sleep period will be considered as working time. To be counted as a reasonable night's sleep, there must be at least one uninterrupted period of continuous sleep of at least three hours, with a total of at least five hours sleep during the scheduled sleep period.

For these reasons, the answer to your first question is that, generally, an employee in the situation you describe need not be paid either overtime pay or regular pay for the time spent sleeping, unless that sleep is interrupted by a call to duty in which case the employee must be paid for either the actual time spent working, or for the entire sleep period if the interruption is such as to deprive her of a reasonable night's sleep.

The answer to the next question – what amount must be paid if payment is required – depends on a number of factors.

It has been this Department's long-standing interpretation of law that although an employee may work two different jobs for the same employer, for the purposes of calculation of overtime, all hours over forty in any week worked for that employer must be paid at overtime rates regardless of the job in which those hours fall.

Regulation 12 NYCRR §142-3.2 states that an employer shall pay overtime to an employee at a rate not less than one and one-half times the employee's "regular rate" of pay for all hours worked in excess of forty pursuant to the Fair Labor Standards Act. The term "regular rate" is defined as "the amount that the employee is regularly paid for each hour of work" and is calculated for salaried employees by dividing the total number of hours worked per week into the employees total earnings. (12 NYCRR § 142-3.14) For salaried employees, the total number of hours worked by the employee is based on the number of hours intended to be compensated by the salary paid to her. (See, Doo Nam Yang v. ACBL Corp., 427 F.Supp.2d 327 (S.D.N.Y. 2005).)

In the present situation, your letter makes it clear that the \$38,000 annual salary is intended to compensate this employee for thirty-five hours per week for the job developer position and for five hours per week of assistance at the residence. As such, the employee's regular rate of pay would be \$18.27 per hour. However, since you have stated that the apartment in question would be this employee's legal residence, the employer is entitled to a "lodging

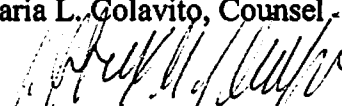
credit" pursuant to 12 NYCRR §142-3.5(a)(2), which credit may not exceed the lesser of either the value of prevailing rentals in the locality for comparable facilities or \$8.90 per day. It is worth noting that should the employee in question maintain or establish a residence other than the apartment provided to her, the lodging credit may not apply since the apartment provided to her may cease to be the employee's primary residence.

The conclusion, from all this, is that if the sleep of the employee in question is interrupted no more than one hour per night, as you anticipate, due to her duties as a paid roommate, then no payment need be made to her beyond her \$38,000 annual salary. If, however, her sleep is interrupted for more than five hours in any week, then all hours actually worked over that five must be paid as overtime wages. Furthermore, if her sleep is interrupted in any one night so as to deprive her of a reasonable night's sleep as defined above, then the entire seven hour sleep period for that night must be calculated as time worked. Such overtime wages must be calculated as one and one half times the employee's regular rate of pay less the applicable lodging credit, i.e. $1.5 \times (\$18.27 \text{ per hour})$ minus the lodging credit. Additional compensation may be required for any work performed by the employee during hours in which she is not required to be present at the apartment but nevertheless performs work. Due to the uniqueness of the circumstances described in your letter, accurate and detailed records of the hours worked by the employee, in both her position as a job developer and as a paid roommate, should be maintained by the employer.

This opinion is based on the information provided in your letters of September 4, 2008 and September 10, 2008. A different opinion might result if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions on this issue, please do not hesitate to contact me.

Very truly yours,

Maria L. Golavito, Counsel


By: Jeffrey G. Shapiro
Associate Attorney

JGS:jc

cc: Carmine Ruberto