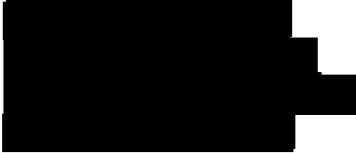




New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Commissioner

March 19, 2010



Re: Request for Opinion
Learner / 12 NYCRR 142-3.12(6)
RO-07-0098

Dear 

I have been asked to respond to your recent communication following up on an earlier letter of September 7, 2007. Please accept my apology for the late response to your request which resulted from a misunderstanding with regard to the mailing of the earlier response.

Your initial letter requests an opinion with regards to the term "learner" as defined by 12 NYCRR §142-3.12(c)(6)(i)-(iii). Your letter specifically requests a precise meaning for the requirement that a training period last "at least two weeks" and poses several scenarios for the requirement.

Regulation 12 NYCRR §142-3.2(c)(6) excludes "learners" from the definition of "employee," and, therefore, the coverage of the Minimum Wage Orders for the period of time such person meets the criteria for learners. The criteria contained in the regulation are as follows:

- (i) The term learner means a person in a nonprofitmaking institution who is participating in a bona fide training program for an occupation in which such person is employed, the required training period for which is recognized to be *at least two weeks*.
- (ii) A bona fide training program is one which must involve either formal instruction or on-the-job training, during a period when the learner is entrusted with limited responsibility and is under supervision or guidance.

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(iii) No person shall be deemed a learner at an institution in an occupation for which he or she has completed the required training; and in no case may a person be deemed a learner in such an occupation at an institution after 10 weeks of such training, except that a person may be deemed a learner for a longer period if the commissioner finds after investigation that for the particular occupation a minimum of proficiency cannot be acquired in 10 weeks.

The Department's interpretation of the phrase "at least two weeks" in 12 NYCRR §142-3.12(c)(6)(i) [emphasis added above] is that it is a period of time constituting at least fourteen consecutive calendar days containing at least ten business days upon which a training program is conducted.

With this background in mind, please accept the following in response to the scenarios you provided:

1. *Any 10 consecutive days.*

If the ten consecutive days are business days, they can meet the "at least two weeks" requirement only if they fall within a period of fourteen calendar days. Furthermore, should the learner be engaged in work for the employer other than that of the training program before the end of the fourteen day period, the "at least two weeks" requirement is not met.

2. *Any 10 non-consecutive days.*

Any ten non-consecutive days may not meet the "at least two weeks" requirement since it does not necessarily constitute at least fourteen calendar days containing at least ten business days upon which a training program is conducted. If the ten non-consecutive days fall within a fourteen calendar day period, they could meet the regulatory requirement. As stated above in number 1, should the learner be engaged in work for the employer other than that of the training program before the end of the fourteen day period, the "at least two weeks" requirement is not met.

3. *9 days of training over a two week period.*

Nine days of training over a two week period does not meet the "at least two weeks" requirement since the two week period does not contain at least ten business days upon which a training program is conducted.

4. *4 days of training within New York and 6 out of New York.*

The regulation contains no requirement that the training program take place in New York State. However, please be advised that regardless of where the training takes place, the "at least two weeks" requirement must be met should the employer or employee be within the coverage of the New York State Labor Law.

5. *5 days of training within New York with anywhere from two to nine additional weeks outside of New York State.*

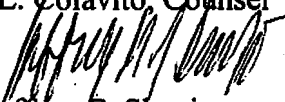
The regulation contains no requirement that the training program take place in New York State. However, a definitive opinion cannot be offered for this scenario since no information is provided upon which to determine whether at least ten business days were conducted during the two week period.

Your letter further asks whether travel time may be counted toward the two weeks of training. 12 NYCRR §142-3.12(c)(6)(ii) provides that a "bona fide training program is one which must involve either formal instruction or on-the-job training, during a period when the learner is entrusted with limited responsibility and is under supervision and guidance." As such, time spent traveling is not considered to be part of the training program, and may not be counted toward the two weeks of training.

This opinion is based on the information provided in your letter of September 7, 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
Associate Attorney

cc: Carmine Ruberto