



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

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May 21, 2009



Re: Request for Opinion  
Computer Employee Exemption  
RO-09-0054

Dear [REDACTED]:

I have been asked to respond to your facsimile dated April 2, 2009 in which you state that one of your employees is threatening you with a lawsuit, presumably for the non-payment of overtime wages. Your letter states that the employee at issue is a "Reference Cash Flow Database Analyst," and states that he gets paid "\$22 pr/hour" and "at least \$455 per week on a salary basis." The employee is in a "data intensive position in the financial industry" that includes, in part, "analyzing performance of asset-backed securities to resolve cash flow payment" and "acting as a client liaison for the computer data businesses in the US." Your letter asks whether the employee in question is exempt under Section 13(a)(1) of the Fair Labor Standards Act as a "computer employee."

The Fair Labor Standards Act (FLSA) is a federal law enforced by the United States Department of Labor. Therefore, please be advised that it is not appropriate for this Department to provide interpretations of federal law as we have no jurisdiction over the enforcement of such law. If you wish to obtain a formal opinion with regard to the interpretation of the FLSA, you should direct your request to the United States Department of Labor, Wage and Hour Division. You can consult your local phonebook to find the office of the USDOL nearest your home or office or you may go to the USDOL website, [www.dol.gov](http://www.dol.gov) for further information in this regard.

Please note, however, that the FLSA does not prevent the states from enacting wage and overtime laws and regulations that are more beneficial to workers than the FLSA (*see* 29 U.S.C. §218; *Manliguez v. Joseph*, 226 F. Supp.2d 377 (EDNY 2002)). Regulations adopted pursuant to the New York State Minimum Wage Act do contain some overtime requirements that apply to employees who are otherwise exempt under the FLSA. Therefore, to the extent that it is necessary to determine the applicability of the New York State Minimum Wage Act, it is appropriate for this Department to determine the applicability of the computer-related employee exemption under the FLSA. This Department's interpretation of the applicability of such exemption neither binds, nor is bound by, an interpretation of the United States Department of Labor.

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The Department recognizes that employees in computer-related occupations are exempt from both the minimum wage and overtime pay requirements in the FLSA by Section 13(a)(1) and Section 13(a)(17) of that Act. Federal regulation 29 CFR §541.100 provides that the exemption for computer employees, under Section 13(a)(1) and Section 13(a)(17) applies only where the employees primary duties consist of:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

The description of the type of work performed by the employee provided in your facsimile does not appear to comport with any of the primary duties described above. If an employee's work is "highly dependent upon, or facilitated by the use of computers and computer software programs," (as the description provided in your letter would indicate) the employee would not fall within the exemption. (29 CFR 541.401.) However, such a determination should not be considered definitive since your letter does not provide sufficient information to determine whether the employee's primary duties fit within those contained above. Such a determination must be based on all of the facts in a particular case, with an emphasis on the character of the employee's job as a whole.

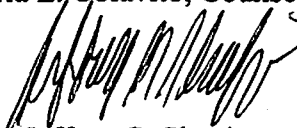
Additionally, to qualify for the computer-related occupations exemption, the employee must be paid at least \$455 per week on a salary basis or paid, on an hourly basis, a rate not less than \$27.63 per hour. An employee is paid on a "salary basis" when the "employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." (29 CFR §541.602(a)) Your letter states that the employee "gets paid \$22 pr/hr" and that "[h]e is paid at least \$455 per week on a weekly basis." While your letter does not provide definitively on what basis the employee is paid, the fact that the employee is paid on an hourly rate less than \$27.63 disqualifies him from the computer-related employee exemption.

Therefore, since the employee's job in question fails to meet all of the necessary requirements for the computer-related occupations exemption under the FLSA, failure to pay the employee at a rate not less than one and one half times his hourly rate (\$33.00 per hour) is in violation of the overtime provisions of the New York State Labor Law. Accordingly, please be advised that this matter has been referred to the New York State Department of Labor's Division of Labor Standards for investigation of such violation.

This opinion is based on the information provided your facsimile dated April 2, 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

A handwritten signature in black ink, appearing to read 'Jeffrey G. Shapiro', written over the printed name below.

By: Jeffrey G. Shapiro  
Associate Attorney

JGS:mp

cc: Carmine Ruberto