



New York State Department of Labor  
Andrew M. Cuomo, Governor  
Colleen C. Gardner, Commissioner

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February 22, 2011

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Re: Request for Opinion  
Overtime – Lifeguard  
RO-10-0176

Dear [REDACTED]:

This letter is written in response to your letter of November 16, 2010, in which you ask whether an employee, exempt from overtime payments pursuant to Section 13(a)(3) of the Fair Labor Standards Act (FLSA), is entitled to overtime at a rate of one and one half times the minimum wage rate or one and one half times his regular rate of pay, under the New York State Labor Law.

You describe your organization as a homeowners' association which provides a swimming pool. The pool is open during the months of July and August only. Pool membership is available to non-residents, who, presumably, are not members of the [REDACTED]. You employ a lifeguard who you assert is exempt from the overtime provisions of the FLSA pursuant to the exemption for seasonal amusement or recreational establishments found in section 13(a)(3).

The New York State Minimum Wage Act, which contains the State minimum wage and overtime provisions, generally applies to all individuals who fall within its definition of "employee." (see, Labor Law §651 *et seq.*) Section 651(5) defines "employee" as "any individual employed or permitted to work by an employer in any occupation," but excludes fifteen categories of workers from that definition. (see, Labor Law §651(5)(a-o).) Subpart 2.2 of the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR §142-2.2) provides, in relevant part, that all "employees" must be paid at a rate not less than one and one half times their regular rate of pay in accordance with the provisions and exceptions of the

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FLSA. Subpart 2.2 also provides that employees exempted under Section 13 of the FLSA must nevertheless be paid overtime at a rate not less than one and one half times the minimum wage. In short, "exempt" employees under Section 13 of the FLSA must be paid at a rate of not less than one and one half times the minimum wage for overtime hours worked unless such employees fall outside of the New York Minimum Wage Act's definition of "employee."

It is not clear however, that your lifeguard is, in fact, exempt from the FLSA's overtime provisions. The United States Department of Labor (USDOL) has interpreted "amusement and recreational establishments" to be "establishments frequented by the public for its amusement or recreation" (29 CFR §779.385). Further guidance may be found in USDOL's Field Operations Handbook at Section 25j06 (a): "a country or town club whose membership fees are nominal (for example, \$100 per year) would be considered open to the general public and may qualify for the Sec 13(a)(3) exemption..." Section 25j06 (b) of the Field Operations Handbook provides: "a country or town club which is not open to the general public, but is available only to a select group of persons (or their guests) who have been specifically selected to club membership or whose membership fees are so high as to exclude the general public, is not considered an amusement or recreational establishment for purposes of the Sec 13(a)(3) exemption."

In a telephone conversation on February 8, 2011, you informed me that the annual dues for pool membership are approximately eight hundred to nine hundred dollars and that there are under thirty total members. It does not appear that your pool is an establishment frequented by the public nor is a membership fee of eight hundred to nine hundred dollars nominal. Accordingly, based upon the information you have provided, it appears that the lifeguard is not exempt under Section 13 (a)(3) of the Fair Labor Standards Act and must be paid at a rate not less than one and one half times his regular rate of pay for all hours worked in excess of forty hours per week.

This opinion is based exclusively on the facts and circumstances described in your letter dated November 16, 2010 and the further information that you provided during our telephone conversation as noted above, and is given based on your representation, express or implied that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,



Victor M. DeBonis  
Senior Attorney

cc: Carmine Ruberto