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

September 17, 2008

[redacted]

Re: Request for Opinion
Overtime - Seasonal Workers
File No.: RO-07-0044

Dear [redacted]:

I have been asked to respond to your letter of May 3, 2007 in which you describe your client's business, the employees of which, you claim, fall under the exemption for seasonal amusements or recreational establishments under §13(a)(3) of the Fair Labor Standards Act (FLSA). Please accept this office's apologies for this late response. You state that you have been informed that under New York State regulation 12 NYCRR §142-2.2, such employees earning more than one and one-half times the minimum wage need not receive overtime wages. You ask for written confirmation of this statement. Please be advised that while this statement is not an accurate representation of law, it is true to a certain extent as a practical matter.

Please be first advised that you do not provide enough information for this Department to determine if your client's business, which you describe as a "Beach and Cabana Club" would be considered an "amusement or recreational establishment" for purposes of §13(a)(3) of the FLSA. Among other things, under New York State's interpretation of this statute, a club must be open to the general public to be considered an amusement or recreational establishment. However, a club that 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, by the State of New York, to be such an establishment.

More fundamentally, you do not describe any "amusement or recreation" provided by this club. For example, New York does not consider marinas to be amusement or recreational establishments as they are merely used by persons engaged in recreation but do not, themselves, provide any recreation. Without a description of the "amusement or recreation" provided by this club, this Department cannot determine that it is an amusement or recreation establishment.

While you have not provided enough information for a determination that this Beach and Cabana Club is an amusement or recreation establishment whose employees are subject to the exemption set forth in §13(a)(3) of the FLSA, this Department will assume, solely for the purpose of answering your question, that these employees are subject to such exemption.

Please be further advised that although 12 NYCRR Part 142, in general, and 12 NYCRR §142-2.2, in particular, apply to employees working in "miscellaneous industries," not all employees listed in your letter may be part of such industries. 12 NYCRR Part 137 is applicable to the "restaurant industry." Given your description of certain employees as "cafeteria and restaurant personnel" it is possible that some, if not all, of your client's business would be considered as part of the "restaurant industry," (*see* 12 NYCRR §137-3.1) and that some, if not all, of your client's employees would be considered restaurant industry employees governed by 12 NYCRR Part 137, not 12 NYCRR Part 142. As such, these employees would not be governed by 12 NYCRR §142-2.2, but by 12 NYCRR §137-1.3. Such employees would, therefore, have to be paid overtime at a rate of one and one half times their regular rate of pay, regardless of whether they were subject to any FLSA exemptions, or not. As you have not provided enough data for a determination as to whether some or all of your client's employees are subject to 12 NYCRR §142-2.2 or 12 NYCRR §137-1.3, the Department will assume, solely for the purpose of answering your question as put, that these employees are subject to12 NYCRR §142-2.2.

New York State Labor Law §190(1) defines "wages," in relevant part, as "the earnings of an employee for labor or services rendered." This Department interprets this term to mean that an employee paid on an hourly basis must be paid for each hour worked. Your question, therefore, asks at what rate such employee must be paid for each of those hours.

New York State Regulation 12 NYCRR §142-2.2 states that employees in New York State who work more than 40 hours per week must be paid for such hours at an overtime rate of one and one-half times their regular rate of pay unless they fall into one of the exemptions listed in the FLSA. If they fall into one of those exemptions, they must be paid overtime at a rate of one and one-half times the minimum wage.

Accordingly, it is not accurate as a matter of law to state that overtime wages need not be paid to FLSA exempted employees earning more than one and one-half times the minimum wage. Such employees must be paid for all hours worked, including each hour worked over 40 in each week. However, as a practical matter, since the mandated hourly overtime wage for such employees is one and one-half times the minimum wage, if an exempted employee's regular wage is equal to or greater than one and one-half times the minimum wage, that employee may be paid for all hours worked, including all hours worked over 40 in each week, at that regular wage without any higher wage for overtime.

This opinion is based upon the information provided in your letter of May 3, 2007. A different opinion might result if any facts provided have been inaccurately stated, or if there are

other relevant facts which have not been disclosed. If you have any further questions, please feel free to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By: Jeffrey G. Shapiro
Associate Attorney

JGS:jc

cc: Carmine Ruberto