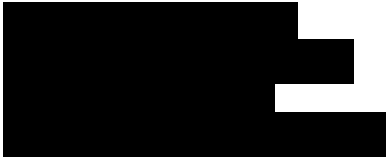




New York State Department of Labor
Eliot Spitzer, *Governor*
M. Patricia Smith, *Commissioner*

February 28, 2008



Re: Request for Opinion
Overtime - Professional
Docket No. RO-08-011

Dear [REDACTED]:

This letter is written in response to your e-mail of January 25, 2008 in which you state that you operate a "healthcare staffing company." You pose two scenarios regarding hours worked by registered nurses supplied by your agency and ask whether overtime wages must be paid to those employees in either scenario. It is this Department's opinion that, by application of the New York State Labor Law, overtime wages need not be paid in either scenario. The Department can offer no opinion, however, as to whether such wages must be paid pursuant to a union contract or the federal Fair Labor Standards Act. With regard to the latter, you should contact the U.S. Department of Labor, Wage and Hour Division, to determine your obligations in this regard.

Both of your scenarios concern nurses who work on the staff of a medical facility and who have also registered for assignments from a "nurse staffing agency." In the first scenario, the agency is a business entity wholly separate from the medical facility, while in the second scenario, the agency is owned and operated by the medical facility. In both scenarios, you pose a situation in which the nurse works at the facility both as part of his/her regular duties and under assignment to the facility through the agency. In both scenarios, your question is whether the nurse must be paid overtime wages if he/she works at the facility for a total of greater than forty hours in any one week.

New York State Regulation 12 NYCRR §142-2.2 states that all "employees" in the State of New York must be paid overtime wages of one kind or another. However, Regulation 12 NYCRR §142-2.14(c)(4)(iii) exempts from the definition of the term "employee," for purposes of these regulations, persons employed in a "bona fide professional capacity." This regulation defines such persons, in relevant part, as those "whose primary duty consists of the performance of work: requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education or from an apprenticeship..."

Phone: (518) 457-4380 Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

There can be no doubt that a registered nurse meets the definition of a person employed in a "bona fide professional capacity." Accordingly, such a person is not an "employee" for purposes of 12 NYCRR §142-2.2. Therefore, the employer of a registered nurse is not required, by New York State law, to pay overtime wages to that person no matter how many hours he or she may work in a given week. As mentioned above, the "professional exemption" set forth in the regulations adopted under the federal FLSA is worded differently from New York's regulation. I suggest, therefore, that you consult the U.S. Department of Labor, Wage and Hour Division, for its interpretation of this regulation.

You mention, in your e-mail, that "If the nurse worked staff at facility over 40 hours, she would be eligible for overtime under terms of her contract with the union and the hospital." Please be advised that states are barred, by federal law, from making interpretations of union contracts. If the resolution of a dispute between an employer and an employee requires interpretation of a union contract or a collective bargaining agreement, the dispute may only be resolved by the federal agency or federal court having jurisdiction over that dispute. Therefore, this Department can offer no opinion on this issue.

This opinion has been provided on the basis of the facts set forth in your e-mail of January 25, 2008. A different opinion may result if such facts were not set forth accurately, or if other relevant facts were not provided.

Very truly yours,

Maria L. Colavito
Counsel

By: Jeffrey G. Shapiro
Associate Attorney

JGS: jc

cc: Carmine Ruberto