



New York State Department of Labor

David A. Paterson, *Governor*

M. Patricia Smith, *Commissioner*

August 13, 2008



Re: Request for Opinion
Overtime
RO-08-0055

Dear [REDACTED]:

I have been asked to respond to your letter of May 9, 2008. Please accept my apology for the late response to your request. Your letter states that your firm represents a not-for-profit company that has an employee who was originally hired under “exempt” status (working 37 hours per week), but has since taken on additional responsibilities in a “non-exempt” program for which she is compensated on an hourly basis (15-20 hours per week). The employee described seeks overtime compensation for the combined hours that she works each week and your letter asks whether she is entitled to such compensation.

An employee’s performance of both exempt and non-exempt activities during the same workweek “defeats any exemption that would otherwise apply.” (See, Skipper v. Superior Dairies, Inc., 512 F.2d 409 (5th Cir. Fla. 1975); see also, Hodgson v. Wittenburg, 464 F.2d 1219 (5th Cir. 1972); Brennan v. Six Flags Over Georgia Ltd., 474 F.2d 18 (5th Cir. 1973); Wyatt v. Holtville Alfalfa Mills, Inc., 106 F.Supp. 624 (D.Cal. 1952), remanded, 230 F.2d 398 (9th Cir. 1955); Crooker v. Sexton Motors, Inc., 469 F.2d 206 (1st Cir. 1972).) The overtime compensation required by the New York State Labor Law and the Fair Labor Standards Act must be paid regardless of the “exempt” work performed by the employee. Accordingly, in the situation you describe in your letter, the employee must be compensated for all overtime hours worked at one and one half times her regular rate of pay.

This opinion is based on the information provided in your letter of May 9, 2008. A different opinion might result if the circumstances outlined in your letter changed, 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

JGS:jc
cc: Carmine Ruberto