New York State Department of Labor
David A. Paterson, *Governor*
Colleen C. Gardner, *Commissioner*

December 7, 2010

[redacted]

Re: Request for Opinion
Overtime
RO-10-0110

Dear Ms. [redacted]:

I have been asked to respond to your letter dated June 24, 2010, in which you request a determination as to whether two employees are considered administrative or professional employees under the applicable State and Federal overtime provisions. Your letter describes two employees, [redacted] and [redacted], who work for your client, [redacted] describes the various "jobs" that the two employees perform, and requests a determination whether your client is required to pay an overtime rate over forty hours for such employees.

Both the Federal Fair Labor Standards Act (FLSA) and the regulations adopted pursuant to the New York State Minimum Wage Act require, with certain exceptions or exemptions, employees to be paid for overtime hours at a rate not less than one and one half times their regular rate of pay. However, as you may know, these requirements are independent of one another and operate to provide both the U.S. Department of Labor and this Department authority over the enforcement of their respective provisions. It is important to note that the FLSA does not prevent 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 from overtime under the FLSA. In order to reach a determination as to whether a job falls under a permitted overtime exemption, the Department may examine both the FLSA and the more stringent provisions of the State Minimum Wage law and Orders. Where the criteria in a New York State exception mirror those for an exemption in the FLSA, this Department usually

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construes the criteria in our regulations in line with those contained in the FLSA, its regulations, and interpretations by the U.S. Department of Labor. However, this Department is not bound by the decisions and interpretations of the U.S. Department of Labor, nor is that Department bound by this or other interpretations issued by this agency.

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 subject to the exemptions of the FLSA. Subpart 2.2 also provides that employees exempted under Section 13 of the FLSA must nevertheless be paid overtime but at a rate not less than one and one half times the minimum wage. As alluded to above, this requirement is independent of the overtime requirements contained in the FLSA, which are not incorporated by reference; rather they operate as independent and concurrent requirements for the payment of overtime.

Your letter inquires as to the FLSA exemptions and state exception from overtime for individuals employed in bona fide administrative or professional capacities. These exceptions/exemptions are discussed individually below in relation to both of the employees described in your letter.

Your letter states that [redacted] is 'a Certified Clinical Medical Assistant, Surgical Assistant, Circulatory-Recovery Assistant, Patient Care Coordinator, and currently makes $21.84 per hour.' In similar fashion, your letter states that [redacted] is 'a Licensed Aesthetician, Clinical Medical Assistant[1], Circulatory-Recovery Assistant, Patient Care Coordinator, and currently makes $21.84 per hour.' In making a determination as to the applicability of an exception to or exemption from legally mandated overtime requirements, this Department does not consider an employee's job description alone to be determinative; rather it evaluates, on a case-by-case basis, the actual *duties* performed by such employee since such duties will often differ, sometimes substantially, from such job descriptions. Such a determination cannot be made simply based upon assurances provided by an employer; rather it is made after an investigation by the Department's Division of Labor Standards. Since no investigation has been made or requested, no definitive determination as to the applicability of the overtime requirements to these particular job titles can be offered at this time.

Moreover, since the employees in question evidently each perform work within several job descriptions, it is impossible to say with any degree of certainty whether either the administrative or professional exemption/exception to the State and Federal overtime requirements could apply. However, we can offer some non-definitive guidance for your information based on the job descriptions provided in your letter. In providing this guidance,

the job duties of the two employees in question will be discussed together since nothing in your letter provides a meaningful basis upon which to differentiate their respective job duties.

Administrative Employee Exemption/Exception

To qualify for the administrative employee exemption under the FLSA, all of the following criteria must be met:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

2. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Similarly, the definition of "employee" for the purposes of the New York Minimum Wage Act excludes individuals employed or permitted to work in a bona fide administrative capacity. (Labor Law §651(5)(e).) Regulation 12 NYCRR §142-2.l4(4)(ii) explains:

Work in a bona fide administrative capacity means work by an individual:

(a) whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general operations of such individual's employer;

(b) who customarily and regularly exercises discretion and independent judgment;

(c) who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (e.g., employment as an administrative assistant); or who performs, under only general supervision, work along specialized or technical lines requiring special training, experience or knowledge; and

(d) who is paid for his services a salary of not less than: ***$543.75 per week on and after July 24, 2009, inclusive of board, lodging, other allowances and facilities.

As previously noted, mere job descriptions are an insufficient basis upon which to evaluate whether the employees in question operate within a "bona fide administrative capacity" under both the FLSA and the State Minimum Wage Orders, since the applicability of such exemptions/exclusions must be determined on a case-by-case assessment of an individual employee's job duties.

With regard to the first criterion in 12 NYCRR §142-2.14(c)(4)(ii) and the second criterion for the FLSA exception, which require the employee's primary duty to consist of office or non-manual field work directly related to management or general operations, the employees in question appears to work in a non-manual capacity and/or perform office work relating to the employer's general operations. The U.S. Department of Labor has interpreted the term "primary duty" to mean the principal, main, major or most important duty that the employee performs. A determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." (FLSA Fact Sheet No. 17c.) Based on the information provided in your letter, the first criterion in 12 NYCRR §142-2.14(c)(4)(ii) and the second criterion for the FLSA administrative exemption would likely be satisfied by individuals performing the work as described in your letter.

The second criterion in 12 NYCRR §142-2.l4(c)(4)(ii) mirrors the third criteria for the FLSA exemption and requires the exercise of discretion and independent judgment. It is impossible to evaluate whether these positions meet this criterion based on the information provided. Since no factual information was provided to make a determination in this regard, no opinion can be offered at this time. However, it is worth noting that most, if not all, of the duties identified appear to be routine duties that would be performed in accordance with specific instructions or protocols followed by the employee rather than duties performed by an employee who customarily and regularly exercises discretion and independent judgment.

The third criterion in 12 NYCRR §142-2.14(c)(4)(ii), which does not have a corresponding FLSA exemption, appears to have been satisfied since the employees' job duties can properly be described as administrative in nature, and they appears to regularly and directly assist the employer.

Finally, the fourth criterion in 12 NYCRR §142-2.14(c)(4)(ii) and the first in the FLSA exemption, both of which impose minimum salary requirements do not appear to be satisfied since the employees in question are not paid a *salary* for their work but, rather, are compensated on an hourly basis.[1] Federal regulation 29 CFR 541.602, which this Department follows in its interpretation of the 12 NYCRR §142-2.14(c)(4)(ii), provides, as relevant to the present inquiry, as follows:

> An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if 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.

Accordingly, while a definitive determination cannot be made in relation to the satisfaction of all of the criteria discussed above, the non-satisfaction of the requirement that

[1] Nothing in your letter indicates that the employees in question are paid on a "fee basis" as defined in federal regulations.

the employees be paid a salary removes the employees in question from both the FLSA exemption and the State exemption for administrative employees.

Professional Employee Exemption/Exception

FLSA Professional Exemption

To qualify for the professional employee exemption under the FLSA, the employee must meet either the requirements for a "learned professional" or a "creative professional." The requirements for a "learned professional" are as follows:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

2. The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

3. The advanced knowledge must be in a field of science or learning; and

4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

In the alternative, the requirements for a "creative professional" for the professional employee exemption under the FLSA are as follows:

1. The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

2. The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Since it is clear that the employees in question do not satisfy the requirements for "creative professionals" under the FLSA, the following analysis looks at whether the "learned professional" requirements are met.

The first criterion, which requires the employees be paid a salary of not less than $455 per week, does not appear to be satisfied since the employees in question are not paid a salary for their work. (See, 29 CFR 541.602 *supra.*)

The second criterion requires that the employee's primary duty require advanced knowledge and the exercise of constant discretion and independent judgment. Nothing in your letter indicates that the employees' work in question requires advanced knowledge and, as noted above, most, if not all, of the duties identified appear to be routine duties that would be

performed in accordance with specific instructions or protocols followed by the employee rather than duties performed by an employee who customarily and regularly exercises discretion and independent judgment. Accordingly, this criterion does not appear to be met.

The third criterion requires that the advanced knowledge be in a "field of science of learning" and the fourth criterion specifies that that knowledge must be acquired by a prolonged course of specialized intellectual instruction. Federal regulation 29 CFR 541.301(c) provides the following guidance in the application of this criterion:

> The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

Applying this guidance to the present matter, nothing in your letter provides a basis upon which to evaluate this criterion. While your letter states that [redacted] is a "Certified Clinical Medical Assistant" and that [redacted] is a "Licensed Aesthetician, Clinical Medical Assistant," you neither provide a description of their activities in those capacities nor the educational requirements for performing such work. Accordingly, no opinion can be offered regarding the satisfaction of these two criteria.

While an analysis of all of the criteria was not possible based on the limited information provided in your letter, the apparent non-satisfaction of the first and second criterion remove the employees in question from the FLSA exemption for professional employees.

NYS Bonafide Professional Capacity

New York State's Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR 142-2.2(c)(4)(iii), states that work in "a *bonafide professional capacity* means work by an individual":

a) 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 and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; or original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and

b) whose work requires the consistent exercise of discretion and judgment in its performance; or

c) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

The first criterion in 12 NYCRR 142-2.2(c)(4)(iii) requires that the employee's primary duty require advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual institution and study. As discussed in the analysis above, nothing in your letter indicates that the employees' work in question requires advanced knowledge and, as noted above, most, if not all, of the duties identified appear to be routine duties that would be performed in accordance with specific instructions or protocols followed by the employee rather than duties performed by an employee who customarily and regularly exercises discretion and independent judgment. While additional information regarding the level of advanced knowledge specifically required for work in these positions could result in a different conclusion, this criterion does not appear to be met based on the information provided.

The second criterion in 12 NYCRR 142-2.2(c)(4)(iii) which requires the exercise of discretion and independent judgment, is impossible to evaluate based on the information provided. Since no factual information was provided to make a determination in this regard, no opinion can be offered at this time. As noted above, most, if not all, of the duties identified appear to be routine duties that would be performed in accordance with specific instructions or protocols followed by the employee rather than duties performed by an employee who customarily and regularly exercises discretion and independent judgment.

The third criterion in 12 NYCRR 142-2.2(c)(4)(iii) requires that the work be predominantly intellectual and varied in character, and that the work cannot be standardized in relation to a given period of time. Since no factual information was provided to make a determination in this regard, no opinion can be offered at this time. Therefore, it is possible that this criterion is also satisfied but formal opinion cannot be given without some breakdown of the amount of time the employee spends on activities standardized in time vs. those which are not.

While an analysis of all of the criteria was not possible based on the limited information provided in your letter, the apparent non-satisfaction of the first criterion removes the employees in question from the State exception for professional employees.

This opinion is based exclusively on the facts and circumstances described in your letters dated June 24, 2010, 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,
Maria L. Colavito, Counsel

By: 
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cc: Carmine Ruberto