



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

January 6, 2011

[REDACTED]

Re: Request for Opinion
Overtime – Exemption
RO-10-0169

Dear [REDACTED]:

I am writing in reply to your letter of November 12, 2010 in which you ask whether your employer is correctly treating you as exempt from overtime payments. You indicate that you have been treated as exempt for the last eight years and, as a result of a reduction in staff, you are working more hours. You ask whether this is permitted by law.

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 construes the criteria in our regulations in line with those contained in the FLSA, its regulations, and interpretations issued 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.

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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 contains no information concerning the nature of your work duties. As a result, it will be impossible for me to assess whether any of the exemptions apply to you. If you still desire an answer to your question, please send us a full description of your job duties.

While I cannot determine whether you are exempt from the overtime provisions of the New York State Minimum Wage Act or the FLSA, you may fall within the exemption for those working in an executive or administrative capacity (Labor Law §651 (5)(c)). The Minimum Wage Order for Miscellaneous Industries and Occupations establishes criteria for determining whether an employee is working in an executive or administrative capacity (12 NYCRR §142-2.14).¹ I have enclosed three previously issued opinion letters from this office addressing the

¹ (i) Executive. Work in a bona fide executive capacity means work by an individual:

(a) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;

(b) who customarily and regularly directs the work of two or more other employees therein;

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;

(d) who customarily and regularly exercise discretionary powers; and

(e) who is paid for his services a salary of not less than:

(5) \$ 543.75 per week on and after July 24, 2009, inclusive of board, lodging, other allowances and facilities.

(ii) Administrative. 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;

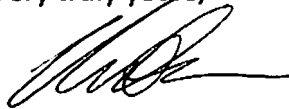
(b) who customarily and regularly exercises discretion and independent judgment;

(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

issue of exemption from overtime requirements. Additional guidance may be found in the Opinions of Counsel published on the Department of Labor's website at <http://www.labor.ny.gov/legal/counsel/counsel-opinion-letters.page>

This opinion is based exclusively on the facts and circumstances described in your letter dated November 12, 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 letters and email 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

(d) who is paid for his services a salary of not less than:

(5) \$ 543.75 per week on and after July 24, 2009, inclusive of board, lodging, other allowances and facilities.