



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

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August 10, 2010

[REDACTED]

Re: Request for Opinion  
Travel Time – 12 NYRR 142.2(b)  
RO-09-0190

Dear [REDACTED]:

I have been asked to respond to your letter of December 31, 2009 in which you ask three questions regarding the rights and obligations of employers to pay traveling employees pursuant to regulation 12 NYCRR §142-2.1(b). The questions posed in your letter are addressed specifically below.

As background for addressing these questions, please be advised that subsection 2.1(b) of the Minimum Wage Order for Miscellaneous Industries (12 NYCRR §142-2.1(b)) states, in relevant part, that the minimum wage shall be paid for “time spent in traveling to the extent that such traveling is part of the duties of the employee.” Additionally, Section 191 of the Labor Law requires the payment of wages at an employee’s agreed rate of pay for all hours worked within a specified time period. In determining whether the time spent traveling is counted as time worked, the time must be considered part of the “duties of the employee” as stated above in 12 NYCRR §142-2.1(b). This Department has previously held that where an employee is not completely relieved from duty and cannot effectively use the time for his own purposes without restrictions, such time must be considered part of the “duties of the employee.” Accordingly, the wage rate for time traveled must be determined in the scope of whether it constitutes part of the “duties of the employee” and then compensation is to be based upon the agreed rate of pay.

Generally, so long as the activity is “an integral part of and indispensable to the various \*\*\* activities for which they were principally employed” the activity is considered within the scope of the duties of the employee. (*Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706, 718. (C.A.2 (N.Y.), 2001, quoting *Mitchell v. King Packing Co.*, 350 U.S. 260, 76 S.Ct. 337, 100 L.Ed. 282 (1956) internal quotations omitted).) Furthermore, the Department

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interprets the language of 12 NYCRR §142-2.1 in line with the federal regulations regarding travel time under the Fair Labor Standards Act. (29 CFR §785.33 et seq.)

In this context, the answers to your questions are as follows:

1) *Does this regulation [12 NYCRR §142-2.1] mean that, when the employer sends the employee on a trip to another store outside of the employee's usual location, the employee must be compensated at the minimum wage for all hours of travel to and from the airport and while traveling on the plane, car, bus or train?*

The answer to this question depends upon the nature and length of the travel, which you do not provide. The regulation provides that employees must be paid not less than the minimum wage rate for time worked or time spent within the scope of work, such as traveling. So long as the time is within the scope of the employee's duties and is required for the proper performance of those duties, the employer must compensate for that time. Unfortunately, since your letter does not describe the nature and length of the travel, no definitive answer to this question can be provided. I suggest you consult federal regulations 29 CFR §785.33 *et seq.* for more information in this regard.

2) *Since these employees are paid \$30 per hour, well-above the minimum wage, the employee is in almost each instance earning well-above the minimum wage for all hours worked, even including travel time. Is this regulation satisfied if the employee is earning more than minimum wage for each hour worked including travel, or must [may] the employer pay for example, \$7.50 for travel time, on top of \$30 per hour for all of the employee's other hours?*

This question proposes having a different rate of pay for all time the employee spends traveling from that of regular hours worked. Section 195(1) of the Labor Law provides, in relevant part, that "[e]very employer shall . . . notify his or her employees, in writing, at the time of hiring of the rate of pay and of the regular pay day designated by the employer in accordance with section one hundred ninety-one of this article, and obtain a written acknowledgment from each employee of receipt of this notice." Labor Law §195(2) provides that "[e]very employer shall . . . notify his employees of any changes in the pay days prior to the time of such changes." The Department interprets these provisions to require employers to provide employees with clear and effective advance notification of any change in pay before such changes are implemented. Furthermore, the Department also interprets the statute as prohibiting any retroactive reductions in pay. Therefore, so long as the "travel pay rate" is clearly and effectively communicated to the employee in compliance with Labor Law §195, does not impose retroactive reductions in pay already earned, nothing in the Labor Law prohibits an employer from paying its employees in the manner in which you describe.

3) *The overtime regulation provides "[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate." See 12 NYCRR 142-2.2. If the traveling hours are overtime hours, can the employer pay time-and-a-half of the minimum wage for the overtime hours which consists of traveling?*

No. All overtime must be paid at a rate not less than one-and-one half the employee's regular rate of pay. The language you quote in Section 142-2.2 requires overtime to be based on an employee's "regular rate." The term "regular rate" is defined as the amount that the employee is regularly paid for each hour of work. Since the employees described in your letter are paid a regular hourly rate of thirty dollars per hour, their overtime rate of pay is one and one-half times that, or forty-five dollars per hour. It is also worth noting that Section 142-2.2 provides that employees who are exempt from the overtime requirements of the Federal Fair Labor Standards Act are required to be paid overtime at a rate not less than one and one half times the minimum wage rate for all overtime hours worked. Employees exempt from the overtime requirements of the Fair Labor Standards Act may be paid, in accordance with your question, at one and one half times the minimum wage for overtime hours that consist of traveling.

This opinion is based exclusively on the facts and circumstances described in your facsimile request letter dated December 31, 2009 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: 

Jeffrey G. Shapiro  
Associate Attorney

cc: Carmine Ruberto