



New York State Department of Labor

David A. Paterson, Governor

M. Patricia Smith, Commissioner

February 10, 2010



Re: Request for Opinion
Compensatory Time
RO-09-0083

Dear [REDACTED]:

I have been asked to respond to your letter regarding the use of language within a collective bargaining agreement which provides for compensatory time in lieu of overtime for employees working for a not-for-profit agency in Buffalo, New York. Please accept my apology for the late response to your request. Your letter states that the employees covered by the agreement are social workers and counselors, the majority of whom make less than \$516.10, presumably per work week. Your letter first asks whether the language contained in the agreement, providing for the accumulation of compensatory time in lieu of overtime, is legal, and, second, whether the employer is obligated to "pay out or buy back" time earned when an employee leaves the employer's service.

1. Permissibility of Compensatory Time.

In answering your first question, the use of compensatory time in lieu of the payment of overtime may be in violation of Articles 6 (Payment of Wages) and/or 19 (Minimum Wage Act) depending on the factual circumstances. Please be advised that although the prohibitions on compensatory time in lieu of overtime in these two Articles are similar, the prohibitions are nevertheless independent of each other.

Labor Law Article 6 (Payment of Wages).

Article 6 of the Labor Law sets forth the requirements for the payment of wages for employees working within the State of New York. Wages, for the purposes of that Article, are defined in Section 190(1) as follows:

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

1. "Wages" means the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. The term "wages" also includes benefits or wage supplements as defined in section one hundred ninety-eight-c of this article, except for the purposes of sections one hundred ninety-one and one hundred ninety-two of this article.

Overtime pay, as you can see, undoubtedly fits within the definition of wages as it is the "earnings of an employee for labor or services rendered."

Section 191 of the Labor Law requires the timely payment in full of an employee's agreed upon wages and sets forth the frequency of such payments for particular categories of employees. For example, manual workers must be paid weekly and not later than seven days after the end of the week in which their wages are earned (Labor Law §191(1)(a)(i)), while clerical and other workers must be paid in accordance with the agreed terms of employment, but not less than semi-monthly, on regular pay days designated by the employer (Labor Law §191(1)(d)). However, it is worth noting that Section 191 does not specify a period of time in which an employer is required to pay employees working in a bona fide executive, administrative, or professional capacity earning in excess of nine hundred dollars a week.

Nothing in Section 191 relieves the employer of the obligation to pay an employee's wages, including any required overtime or hours worked, within the time period allotted. Accordingly, an employee within the coverage of Section 191 of the Labor Law may not be given compensatory time in lieu of the payment of overtime. Unfortunately, your letter does not sufficiently describe the nature of the work performed by the individual workers so as to permit a determination to be made as to whether such workers fit within the coverage of Section 191 of the Labor Law.

Additionally, it is worth noting that workers not considered to be "employees" under Article 19 of the Labor Law (see below), who are nevertheless "employees" under Article 6 of the Labor Law, which contains a much more expansive definition of that term, must be paid within the time period allotted by Section 191. In such a situation, an individual outside of the coverage of the overtime requirements of Article 19 of the Labor Law must nevertheless be paid wages earned, at the applicable rate, for the hours worked within the period prescribed by Section 191 of the Labor Law.

Labor Law Article 19 (Minimum Wage Act).

Article 19 of the State Labor Law (Minimum Wage Act) and the regulations adopted thereunder, require that employees be paid at a rate not less than one and one-half times their regular rate of pay for all hours worked in excess of forty for non-residential employees, or forty-four for residential employees per workweek. (see, Labor Law §650 et seq.; 12 NYCRR §142-3.2.) Employees exempted from overtime coverage by Sections 7 and 13 of the Federal Fair Labor Standards Act (FLSA) are similarly required to be paid overtime, but at a rate not less than

one and one-half times the minimum wage rate. (*Id.*) Nothing in Article 19, or the regulations adopted thereunder, permits the substitution of future time off in lieu of the payment of overtime; rather, 12 NYCRR §142-2.2 clearly mandates that “an employer shall pay an employee for overtime.” Accordingly, Article 19 prohibits the utilization of compensatory time in lieu of overtime for all “employees” under Article 19, regardless of such employees’ exempt status under the FLSA. However, it must be noted that should a worker not fall within the definition of “employee” under Article 19 of the Labor Law, the protections contained therein and the prohibition on compensatory time in lieu of the payment of overtime contained in that Article, are inapplicable. (*see* Labor Law §651(5); 12 NYCRR §142-3.12.)

Your letter states that your members work as social workers and counselors, have both Master’s and Bachelor’s degrees, and while some may make more than \$516.10, the majority make less. While such a description certainly does not provide a basis upon which this Department may evaluate whether the individuals in question meet any of the exclusions from the definition of employee; the work performed, educational background, and amount made by some of the workers indicates that some of the workers may fit within the exclusion for work in a bona fide executive, administrative, or professional capacity. (*see*, Labor Law §651(5)(c); 12 NYCRR §142-2.14(4).)

Accordingly, while compensatory time in lieu of overtime is not per se prohibited by the New York State Labor Law, its use is limited by Articles 6 and 19 to the situations in which an individual is neither an employee as defined by Article 6 of the Labor Law nor works in a bona fide executive, administrative or professional capacity making more than \$900 per week under Article 6, nor falls within the definition of “employee” under Article 19 of the Labor Law.

Since your question arises out of terms of a collective bargaining agreement, it is necessary to determine whether such terms may constitute a valid waiver of the statutory protections contained in the Labor Law which the above discussion concludes are being violated. In American Broadcasting Companies, Inc. v. Roberts, 61 N.Y.2d 244 (1984), the New York State Court of Appeals held that provisions of the Labor Law are waivable through a bona fide collective bargaining agreement in which the employee received a desired benefit in return for the waiver, so long as the waiver or modification of the statutory intent does not contravene the legislative purpose of the statute. The Court held that where there was no express legislative indication that waiver was precluded, “a bona fide agreement by which the employee received a desired benefit in return for the waiver, the complete absence of duress, coercion or bad faith and the open and knowing nature of the waiver’s execution” may effectively waive or modify the benefit provided by the statute to the employees.

As stated above, a waiver of a statutory guaranteed benefit to a worker is only permissible where the waiver does not contravene the statutes legislative purpose. (*Id.*) The purpose of the New York State Minimum Wage Act was announced by the Legislature through Labor Law §650, which provides, in part, that “[e]mployment of persons at these [sub-minimum wages] insufficient rates of pay threatens the health and well-being of the people of this state and injures the overall economy.” Agreeing to receive a rate of pay deemed to be insufficient by the Legislature, even in exchange for some other desired benefit in return for the waiver, contravenes this purpose. Therefore, the provisions contained within the Minimum Wage Act (Article 19) of

the New York State Labor Law, related regulations, and administrative policies or procedures, are not waivable through collective bargaining agreement or otherwise. This conclusion gains further support from the fact that the Federal courts have unanimously ruled that the minimum wage and overtime provisions of the Fair Labor Standards Act may not be waived by the employee or through collective bargaining based on the fact that Congress intended to make them mandatory and not subject to waiver. (See, Local 246 Utility Workers Union v. Southern Cal. Edison Co., 83 F.3s 292, 297 (CA9, 1996); Braddock v. Madison County, 34 F.Supp.2d 1098, 1107, (S.D. Indiana, 1998) citing to Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706-707 (1945). Therefore, the restriction contained in Article 19 of the Labor Law is not waivable pursuant to a validly executed collective bargaining agreement.

Similarly, Section 191 of the Labor law, which is titled "Frequency of Payments," was enacted to assure employees' prompt and expeditious payment of wages notwithstanding a contract to provide otherwise. (See, *People v. Grass*, 257 A.D. 1 [1st Dep't 1939], holding that former Section 196, from which Section 191 was derived, cannot be waived by contract.) Furthermore, Section 191, by its terms, provides that "no employee shall be required to accept wages at periods other than as provided in this section." (Labor Law §191(2).) As such, it is the opinion of this Department that Section 191 of the Labor Law cannot be waived through collective bargaining agreement as the Legislature has clearly expressed the intention that waiver be precluded.

Additionally, it is worth noting that the imposition of Articles 6 and 19 upon unionized workers and a union contract does not run afoul of the National Labor Relations Act (NLRA) since those Articles are not intended to directly touch on labor relations, the regulation of these activities is a peripheral concern to the NLRA, and the state has an overriding interest in applying the provisions of those Articles. (See e.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-244 [1959].) Accordingly, while the Department of Labor does not have jurisdiction over the collective bargaining agreement itself, it nevertheless has authority over the employer's violations of Articles 6 and 19 of the Labor Law as a result of such agreement.

2. Requirements to Buy Back Compensatory Time

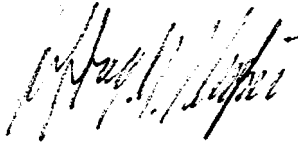
The answer to your second inquiry, whether an employer is required to buy back compensatory time, is not governed by the provisions of the New York State Labor Law and would depend solely on the employment agreement. Section 198-c requires that all employees be paid benefits or wage supplements, which are included in the term "wages" as defined by Section 191(1) and is defined by Section 198-c(2) to include, but not be limited to, "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay," in accordance with the provisions of the employment agreement. An employer may be subjected to criminal liability for a failure to pay such benefits and wage supplements within 30 days of the payments being due. (see Labor Law §198-c(1).) However, Section 198-c(3) excludes employees working in a bona fide executive, administrative, or professional capacity from its coverage. Since compensatory time in lieu of overtime is only permissible under Article 6 of the Labor Law where an individual is outside of the definition of "employee" or is working in a bona fide executive, administrative, or professional capacity, Section 198-c

cannot be construed to require that an employer buy back compensatory time. Therefore, the Department would not have authority to enforce any requirement to pay back compensatory time. It is important to note, however, that employees may have a private cause of action against an employer for its refusal to buy back compensatory time. Should such a situation arise, I suggest you consult with private counsel.

This opinion is based on the information provided in your letter dated June 4, 2009. A different opinion might result if the circumstances stated therein change, if the facts provided were not accurate, or if any other relevant fact was not provided. 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

JGS:mp

cc: Carmine Ruberto