



New York State Department of Labor
Elliot Spitzer, Governor
M. Patricia Smith, Commissioner

October 15, 2007



Re: Request for Opinion
Minimum Wage - Spread of Hours
Our File No.: RO-07-0106

Dear [REDACTED]:

I have been asked to respond to your letter of October 1, 2007 in which you ask for this Department's interpretation of New York State Regulation 12 NYCRR §142-2.4 in light of the decision in *Doo Nam Yang v. ACBL*, 427 F. Supp. 327 (SDNY 2005). You ask whether *Yang* is "controlling" "or are (you) able to determine the need to provide the additional 'one hour's pay at the basic minimum hourly wage rate' based on (this Department's) three-pronged test referenced (in previously issued guidelines)?" Please be advised that *Yang* is not controlling. The manner of calculating "spread of hours pay" is set forth below.

Enclosed please find a copy of an opinion letter issued on April 12, 2006 setting forth this Department's interpretation of 12 NYCRR §142-2.4. Please note that such opinion referenced *Yang*, but noted that a short time after that decision, a different judge of the same court held in *Chan v. Triple 8 Palace, Inc.*, 2006 U.S. Dist. Lexis 15780 (SDNY 2006), that he disagreed with *Yang* and found that the Department's interpretation of this regulation was reasonable. Please note that since those decisions were rendered, the same court has found that "the federal cases since *Yang* have not followed it, but have uniformly endorsed the Department of Labor's position," (*Almeida v. Aguinaga*, 500 F. Supp 2d 366 (SDNY 2007) (citations omitted)). Please also note that the highest New York State court to address this issue held in *Seenaraine v. Securitas Security Services USA, Inc.*, 37 A.D.3d 700 (2nd Dept 2007) that "the Department of Labor's interpretation of the regulation is neither unreasonable nor irrational, nor is it in conflict with the plain meaning of the promulgated language. Thus, it is entitled to deference," (*id* at 701-702). Although the Second Department cited *Yang*, it declined, for the above-stated reasons, to follow it.

Accordingly, this Department considers the *Yang* decision to be without force and effect. The Department's written guidelines referenced by you, and the above-cited opinion letter of April 12, 2006 remain this Department's interpretation of 12 NYCRR §142-2.4.

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This opinion is based on the information provided in your letter of October 1, 2007. A different opinion might result 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
Senior Attorney

JGS:jc

enc.

cc: Carmine Ruberto
