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

October 15, 2010

[redacted]

Re: Request for Opinion
Commission Salespersons
RO-10-0010

Dear [redacted];

This letter is written in response to your letter dated January 18, 2010, in which you request an opinion as to the Department's interpretation of the term "substantial," as it is used in Section 191(1)(c). As relevant to your inquiry, Section 191(1)(c) of the Labor Law, which deals with the frequency of payments and other requirements for commission salespersons, provides, in relevant part, as follows:

> c. Commission salespersons.--A commission salesperson shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment, but not less frequently than once in each month and not later than the last day of the month following the month in which they are earned; provided, however, that if monthly or more frequent payment of wages, salary, drawing accounts or commissions are substantial, then additional compensation earned, including but not limited to extra or incentive earnings, bonuses and special payments, may be paid less frequently than once in each month, but in no event later than the time provided in the employment agreement or compensation plan... [emphasis added]

Your letter asks whether wages, salary, drawing accounts, or commissions are considered to be "substantial" at a certain salary amount, or whether they are considered to be substantial as a percentage of any industry standards.

After a review, we were unable to locate any case law construing the term "substantial" as it is used in Section 191 of the Labor Law. Accordingly, in rendering this opinion, the Department sought to construe that term in light of the plain meaning of the term, the context in which the term is

Phone: (518) 457-1938 Fax: (518) 457-1164
W. Averell Harriman State Office Campus, Bldg. 12, Room 508, Albany, NY 12240

www.labor.ny.gov michael.paglialonga@labor.ny.gov

used, the Department's experience in enforcing that Section of the Labor Law, and the remedial nature of the statute. In interpreting this section of law, we are guided by New York Court of Appeals decisions providing that the Labor Law should be read broadly in favor of worker protections. (*See*, *Red Hook Cold Storage Co. v. Department of Labor*, 295 N.Y. 1 (1945)).

As you know, the basis for the frequency of pay requirements in Section 191 of the Labor Law is the type of work that the employee is engaged and, in the case of executive, administrative or professional employees, the amount of weekly compensation. Executive, administrative and professional employees are excluded from the protections of that Section provided their wages exceed nine-hundred dollars per week. The language in Section 191 at issue falls under the requirement that wages be paid to commission salespersons as provided in the employment contract but not less than once a month, and applies to the payment of "additional compensation earned, including but not limited to extra or incentive earnings, bonuses and special payments." In similar fashion to the exclusion for executive, administrative and professional employees paid in excess of nine hundred dollars per week, any "additional compensation" payments may occur less frequently than once a month, provided that the "monthly or more frequent payment of wages, salary, drawing accounts or commissions are substantial." Since the exclusion from the protections of Section 191 for executive, administrative and professional employees is conditioned upon their wages exceeding nine-hundred dollars per week, the overall statutory scheme appears to support the conclusion that such a sum may properly be identified as being "substantial," for the extended purpose of the provision in question. Accordingly, the term "substantial" in Section 191(1)(c) should be determined in accordance with the threshold amount in Section 190(7) for employees in a bona fide executive, administrative or professional capacity since that amount was deemed to be significant by the Legislature in excluding such employees from the protections in Section 191. Such an approach is also consistent with the general approach enunciated by the Court of Appeals in support of interpreting statutory provisions in favor of worker protections.

This opinion is based exclusively on the facts and circumstances described in your letter dated January 18, 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: Michael Paglialonga

Michael Paglialonga
Assistant Attorney I

CC: Carmine Ruberto