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

February 25, 2010

[redacted]

Re: Request for Opinion
Rounding of Time
RO-09-0129

Dear [redacted]:

This letter is written in response to your letter of September 15, 2009 in which you request an opinion as to whether an employer's rounding practice described therein is permissible under the New York State Labor Law. Please accept my apology for the delay in responding to your letter. Your letter states that an employer which operates a hotel containing a full-service restaurant uses an electronic punch clock to record the employees' hours worked. The bookkeeping software used by the employer automatically rounds the "punch time" to the nearest seven minute interval. In the example used in your letter, an employee who punches in at 7:54 or 8:06 is credited with punching in at 8:00. As your letter poses six questions arising under these circumstances, the questions posed in your letter are quoted and addressed individually below in the order posed by you.

1. *Is the above-described rounding practice lawful under [the] New York Labor Law?*

Federal regulation 29 CFR §785.48(b) provides as follows:

> (b) "Rounding" practices. It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used

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> in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

It has been this Department's longstanding policy to follow the principles set forth in 29 CFR §785.48(b) in its enforcement of Articles Six (Payment of Wages) and Nineteen (Minimum Wage) of the Labor Law. Applying those principles to the situation described in your letter, it appears that the rounding practice you describe does not, on its face, violate the requirements of the New York State Labor Law.

2. *Does the Department of Labor have a guideline to determine what is appropriate rounding of punch records under [the] New York Labor Law? As noted above, the employer utilizes an electronic time clocks [sic] and software later rounds [sic] the punch using seven-minute increments, which we understand is relatively common in the hospitality industry.*

The Department, as noted above, follows the principles set forth in 29 CFR §785.48(b) with regard to rounding. That regulation recognizes that rounding is commonly accepted in industry at intervals ranging from five to fifteen minutes. Accordingly, since the rounding interval described in your letter falls within the permissible intervals in 29 CFR §785.48(b), it is the opinion of this Department that such interval is permissible under the New York State Labor Law.

3. *If a non-exempt employee is scheduled to work 37.5 hours per week, but the punch reflect 38.75 hours for the week, does the rounding of 1.25 hours of punch time back to 37.5 hours violate [the] New York Labor Law?*

As stated above, rounding practices are permissible provided that they are used in such a manner that it will not result in a failure to compensate employees properly for all the time they have actually worked over a period of time. Your question does not provide enough information to evaluate whether the rounding of 38.75 punch hours to 37.5 hours violates the provisions described above since the other surrounding workweek's rounding practices were not provided. However, so long as the employee is compensated properly for all hours worked over a period of time, e.g. through rounding 36.25 punch hours to 37.5 hours worked in the previous week, such practice, as described, is permissible under the New York State Labor Law.

4. *Assume that an employee is regularly scheduled to work 37.5 hours per week. If he or she begins work early or works after the regular finishing time, is additional straight time compensation due under [the] New York Labor Law? Under the FLSA, no such payment would be required assuming the employee was paid more than the minimum wage and did not exceed 40 hours of work in a workweek. See, Wage and Hour Opinion Letter, FLSA 2008-7NA, (May 15, 2008). Does New York follow the federal law on this issue, or does [the] New York Labor Law specifically require the employee to be paid for all hours worked at the stated, regular, hourly rate of pay?*

In responding to this question, it is important to note that the underpayment which you describe does not appear to be the result of a rounding practice. Therefore, federal regulation 29 CFR §785.48(b) is inapplicable to justify the non-payment of wages for all hours worked during the workweek based on prior or subsequent rounding of time. Section 191 of the Labor Law requires employees be paid for all hours worked no later than the time period specified by that Section. Please be advised that the FLSA does not prevent the 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)). Therefore, the requirement in Section 191 of the Labor Law that employees be paid for all hours worked is enforceable upon employers in New York State notwithstanding any provision in or interpretation of the FLSA that provides otherwise.

5. *Would the Department of Labor change its response to Question 4 if the employee was advised in writing to punch in and out within 7 minutes of their start time, not to work any unrecorded or "off the clock" work hours at any time and not to work overtime unless such time was pre-approved, all under threat of disciplinary action?*

Employees must be paid for all hours suffered or permitted to work regardless of whether such time was approved or in disregard of the employer's policies. Therefore, the response to question 4 would remain unchanged.

6. *If an employee receives premium pay that is not otherwise due (e.g., time and one half- for working over 8 hours in a day) can the employer use that as a credit against any additional straight time pay or overtime pay that may be due in that workweek?*

Assuming you are referring to the State minimum wage requirement with your use of the phrase "straight time pay," please be advised that the New York State Labor Law requires that employees be paid for all hours worked per workweek at a rate not less than the minimum wage specified therein. (12 NYCRR §142-2.1 *et seq.*) Nothing in the New York State Labor Law prohibits an employer from taking credit for "premium pay" not otherwise required to be paid to the employee in satisfaction of its weekly minimum wage obligation, so long as taking such a credit does not contravene any other provision contained therein and such credit is provided as part of the employee's rate of pay. For example, an employer that pays its employees at the minimum wage rate of $7.25 per hour plus an additional five dollars per hour for all night shift hours may use the additional night shift payment to satisfy any other minimum wage obligations owed to that employee for that work week, including spread of hours and call-in pay. Therefore, an employer can use "premium pay" as a credit against its State minimum wage obligations.

With regard to the overtime pay requirements of the New York State Labor Law, please be advised that employees are generally required to be paid for all overtime hours at a rate not less than one and one-half times their regular rate of pay. (12 NYCRR §142-2.2.) When an employee's regular rate of pay is on a non-hourly basis, as would be the case where credits are taken for previous increased rates of pay, the employee's regular rate is determined by dividing the total hours worked during the week into the employee's total earnings, which necessarily takes any additional "premium pay" into account. (*see*, 12 NYCRR §142-2.16.) Under the example in the preceding paragraph, an employer may not use the night shift premium pay as a

credit for satisfaction of any overtime paid to an employee. Any amounts paid to the employee, including the night shift premium, must be included in the employee's regular rate of pay by which that employee's overtime rate is calculated. Therefore, an employer cannot use such "premium pay" as a credit against additional overtime pay due to an employee in any workweek, since that pay must be included in determining the employee's regular rate of pay.

This opinion is based on the information provided in your letter of September 15, 2009. A different opinion might result if the circumstances outlined in your letter changed, if the facts provided were not accurate, or if any other relevant fact was not provided.

Very truly yours,

Maria L. Colavito, Counsel

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