



New York State Department of Labor

David A. Paterson, Governor

M. Patricia Smith, Commissioner

April 17, 2008



Re: Request for Opinion  
Overtime Wages  
File No. RO-08-0031  
Your File -



Dear Mr. Fryer:

I have been asked to respond to your letter of March 24, 2008 in which you request clarification of previous opinions issued by this Department. These prior opinion letters state, in summary, that New York State regulation 12 NYCRR §142-2.2 requires employers to pay overtime wages of at least one and one-half times an employee's regular rate of pay, except in the case of employees subject to certain exemptions set forth in the Fair Labor Standards Act (FLSA), which employees must be paid overtime wages of at least one and one-half times the applicable minimum wage.

Please be first advised that you have, in general, correctly described the New York State Department of Labor's interpretation of this regulation. It has been this Department's consistent interpretation that if an FLSA exempt employee is paid wages equal to or greater than one and one-half times the applicable minimum wage for all hours worked over forty in a week, then the requirements of 12 NYCRR §142-2.2 have been satisfied. Therefore, if an FLSA exempt employee whose regular rate of pay is equal to or greater than one and one-half times the applicable minimum wage is paid his/her regular rate of pay for all hours worked over forty in a week, then the requirements of 12 NYCRR §142-2.2 have been satisfied, and there is no requirement that such an employee be paid any extra wages beyond his/her regular rate for such overtime.

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Accordingly, the example you propose, in which an FLSA exempt employee whose regular rate of pay is \$15.20 per hour receives such wages "for all hours worked, whether the hours are straight-time or overtime," describes circumstances in which the employee is paid for his overtime in full compliance with 12 NYCRR §142-2.2.

Please be advised, however, that there is one section of your letter in which you do not accurately describe New York State Law, *i.e.* your statement that:

Further, under 12 NYCRR §142-2.2, it appears the employee need only be compensated at the rate of \$10.725 for each hour worked above forty (40) in a workweek, even if his or her "regular rate" for straight-time hours exceeds this figure. Thus, it would be possible under New York law for an employee exempt under Section 13 of the FLSA to receive an overtime rate lower than his or her "regular rate."

Please note that New York State Labor Law §191(1) sets forth various categories of employees, and the time periods within which such employees must be paid. Please note that the statute provides that for each category of workers, wages must be paid "in accordance with the agreed terms of employment." Please further note that New York State Labor Law §193(1) states that "(n)o employer shall make any deduction from the wages of an employee" except under certain limited circumstances described in that statute, none of which circumstances are applicable to the facts provided in your letter.

Reading these two statutes together, it is the Department's opinion that an employee whose "agreed terms of employment" are that he/she receive wages at the regular rate of \$15.20 per hour must receive timely payment of wages at such rate for all hours worked. It is the Department's further opinion that to pay such an employee wages at any lesser rate for any time worked would be an illegal deduction from wages. It is also the Department's opinion that an interpretation of 12 NYCRR §142-2.2 that would result in an employee being paid less for overtime than for straight-time must be rejected as "a construction that would make [the regulation] absurd," (*see* Statutes §145).

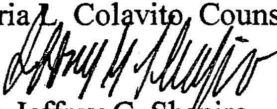
Accordingly, to pay an FLSA exempt employee whose regular rate of pay is \$15.20 at such rate for all hours worked, straight-time or overtime, would constitute compliance with 12 NYCRR §142-2.2, but such employee may not be paid any less than that regular rate for any time worked.

This opinion is based on the information provided in your letter of March 24, 2008, a copy of which is enclosed. A different opinion might result if any facts provided have been

inaccurately stated, or if there are other relevant facts that have not been disclosed. If you have any further questions, please feel free to contact me.

Very truly yours,

Maria L. Colavito, Counsel

  
By: Jeffrey G. Shapiro  
Associate Attorney

JGS: jc  
Enc.

cc:



Carmine Ruberto - NYS Department of Labor, Director of Bureau of Labor Standards