



New York State Department of Labor
David A. Paterson, *Governor*
M. Patricia Smith, *Commissioner*

March 9, 2009

[REDACTED]
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[REDACTED]
[REDACTED]

Re: Request for Opinion
Minimum Wage/Overtime
Hotel Industry
R0-08-0137

Dear [REDACTED]:

I have been asked to respond to your letter of November 4, 2008 in which you state that you are counsel to a labor union representing workers in the hotel industry. Your letter states that, recently, a hotel employer notified your client of its intentions to classify banquet staff as exempt from overtime pursuant to Section 7(i) of the Fair Labor Standards Act (FLSA [29 USC §201 *et seq.*]). The questions posed in your letter regarding such an exemption are addressed individually below.

1. Would the rate of pay prescribed by Section 7(i) of the FLSA be used to determine the employee's "regular rate" under 12 NYCRR §138-4.16, and would that "regular rate" be used for calculating overtime hourly rates pursuant to 12 NYCRR §138-2.2?

Yes. Subpart 4.16 of the Minimum Wage Order for the Hotel Industry defines "regular rate," for purposes of that part, as "the amount that the employee is regularly paid for each hour of work." The determination of an employee's regular rate of pay is made under Subpart 4.16 regardless of whether such rate is used to satisfy provisions contained in the FLSA. An employee's overtime hourly rate would therefore be calculated at one and one half times such regular rate pursuant to Subpart 2.2.

2. Would the wait staff continue to be subject to the Minimum Wage Order for the Hotel Industry without regard to whether they were treated as exempt under Section 7(i) of the FLSA?

Yes. While an employee may be exempted from the minimum wage and overtime protections of the FLSA, the FLSA expressly allows state laws to provide employees with greater protections than those provided by Federal Law. (*see*, 29 USC §218(a).) "FLSA does

not, however, pre-empt state regulation of wages and overtime if the state's standards are more beneficial to workers," (*Manliguez v. Joseph*, 226 F. Supp.2d 377,388-389 (EDNY 2002)). Therefore, insofar as the Minimum Wage Order for the Hotel Industry guarantees employees minimum wage and overtime protections exceeding the FLSA, such protections control. Under the New York State Labor Law, an employee's exempt status under the FLSA does not diminish their rights or protections provided by the New York State Labor Law, unless otherwise provided therein. The Minimum Wage Order for the Hotel Industry makes no reference to the FLSA, and that Act's exemptions, are, therefore, not applicable to employees covered by it.

3. Assuming an employer, in order to satisfy the exemption under Section 7(i) of the FLSA, calculates the employee's regular rate as including the full tip amount received (i.e. basic hourly rate of \$5.30 plus an average service charge of \$18.00 equaling a regular rate of \$23.30), would the employer be obligated to pay one and one halftimes such a regular rate for all hours worked in excess of 40?

As set forth above, 12 NYCRR §138-4.16 defines "regular rate" as "the amount that the employee is regularly paid for each hour of work. Furthermore, Labor Law §190(1) defines the term "wages" as "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." As such, it is this Department's opinion that if an employer uses an amount paid to an employee as part of the calculation of the employee's regular rate for federal purposes then that amount paid must be deemed part of the employee's regular rate for New York State purposes. Accordingly, if an employer deems an employee's regular rate of pay to be \$23.30 per hour for purposes of Section 7(i) of the FLSA, then that shall be deemed to be the employee's regular rate for all New York State purposes, including but not limited to the calculation of overtime due to that employee pursuant to 12 NYCRR §138-2.2.

This opinion is based on the information provided in your letter dated November 4, 2008. A different opinion might result if the circumstances outlined in your letter 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:da

cc: Carmine Ruberto

* Please be advised that this issue is further explained at:

<http://www.labor.ny.gov/formsdocs/wp/LS-14-OP-4-mandatory-gratuity-calculation-of-overtime-04-10-14.pdf>