

OPINION FILE



Eliot Spitzer, Governor

January 31, 2007

VIA FAX AND MAIL

Re: Request for Opinion
Overtime Pay - Holiday Credit
Our File No.: RO-06-0088

Dear [REDACTED]:

This letter is written in response to the telephone call made to me by you and union representative [REDACTED] on September 6, 2006. In such telephone call you posed a slightly different scenario from that presented in your letter of August 9, 2006. In this new scenario, as presented, no additional wages must be paid.

You stated that the employee in question worked eight hours each day from Sunday, July 2, 2006 through Friday, July 7, 2006. The employee was paid at her regular rate on each day except Tuesday, July 4, 2006. On that day she was paid for eight hours at time and one-half her regular rate as and for her employer's regular practice of paying holiday pay.

As stated in my previous letter, New York State regulation 12 NYCRR §142-2.2 requires, in relevant part, that "an employer shall pay an employee for overtime at a rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 U.S.C. 201 *et. seq.*, the Fair Labor Standards Act (FLSA) of 1938, as amended." Although section 7(e) of the FLSA (29 USC §207(e)) defines "regular rate" as "all remuneration for employment paid to, or on behalf of the employee," such section goes on to exclude from that definition "extra compensation provided by a premium rate paid for work by the employee on . . . holidays . . . where such premium rate is not less than one and one-half times the (employee's usual rate of pay)," (29 USC §207(e)(6)).

The FLSA also states (29 USC §207(a)(1)) that "no employer shall employ any of his (sic) employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Accordingly, employees must be paid for any time worked above forty hours in any week at time and one-half his/her regular rate.

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In our telephone conversation, [REDACTED] indicated his belief that employees must be paid time and one-half for all time above forty-four hours worked in a week. I believe this may be a reference to 29 USC §207(a)(2)(A), which sets forth such requirement, but only for certain employees for a period of one year from the enactment of certain amendments made to the FLSA in 1966. 29 USC §207(a)(2)(C) states that after two years from that date, the regular forty hour work week applies to all employees. It could also be a reference to the aforementioned State regulation 12 NYCRR §142-2.2, which states that "the applicable overtime rate shall be paid for each work week" for working time over forty hours for non-residential employees or forty-four hours for residential employees. It is my understanding that the employees in this and the previous scenario are non-residential employees, to wit: security officers. Therefore, this analysis is based, as was the August 29, 2006 analysis, on the assumption that the employees were required to be paid overtime for all hours worked over forty each week, not all hours over forty-four as required for residential employees.

In this new scenario, you pose a situation in which an employee worked forty-eight hours in one week, eight of which hours were paid at a premium rate of time and one-half for work performed on a holiday. Such premium pay is excluded, by law, from the calculation of the employee's regular rate. The FLSA requires that this employee should have been paid, at minimum, for forty hours at her regular rate, plus eight hours at time and one-half for overtime. Therefore, as the holiday pay is excluded from the calculation of the employee's regular rate, and as the employee received the exact amount of pay for this week's time as required by the FLSA, no additional pay is required for this time worked.

This opinion is based upon the information provided in your letter of August 9, 2006 and your telephone call of September 6, 2006. A different opinion might result if any facts provided have been inaccurately stated, or if there are other relevant facts which have not been disclosed.

If you have any further questions, please feel free to contact me.

Very truly yours,

Jeffrey G. Shapiro
Senior Attorney

JGS:dmm

cc: Carmine Ruberto