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

Dayfile

September 2, 2008

[redacted]

Re: Request for Opinion
Farm Workers
Wage Deductions
RO-08-0108

Dear [redacted]

This letter is written in response to your letter dated July 1, 2008, addressed to Carmine Ruberto, Director of Labor Standards, and a subsequent letter from [redacted] to Alyssa Talanker dated August 21, 2008. These letters request a formal ruling from the Department of Labor explaining the provisions for overtime and for wage deductions for utilities under the New York State Labor Law ("Labor Law") as relied upon by the Division of Labor Standards in its investigation of your company. The [redacted] Companies [redacted] operate a potato growing and processing operation in the [redacted] Region of Central New York. [redacted] not only processes and sells potatoes grown by their own growing operation, but also those obtained from other farms. On November 30, 2007, the Department of Labor visited a [redacted] facility and spoke with [redacted] and several migrant workers employed by [redacted]. Based on that visit, an investigator for the Department of Labor wrote to [redacted] on December 28, 2007 requesting an audit of [redacted] payroll and time records for hours worked by employees in the "packing house" for the past six years. A review of the audit for illegal deductions and overtime performed by [redacted] revealed that unlawful deduction of wages had been made and that overtime wages due had not been paid. Accordingly, the Department instructed [redacted] to prepare a payment of $62,877.47, payable to the Commissioner of Labor. Your letter of July 1, 2008 indicates that a check is being held in your office awaiting the result of the Department of Labor's final ruling.

Overtime

The Fair Labor Standards Act ("FLSA") requires that employees be paid overtime wages at a rate of at least one and one-half times their regular rate of pay for all hours worked in excess of forty per week. (See generally, 29 USC §207.) However, the FLSA exempts employees employed in agriculture from this requirement. (See, 29 USC §213(b)(12); 29 USC §203(f)).

Generally, employees exempted by the FLSA are nevertheless required under state law to be paid at an overtime rate of at least one and one half times the minimum wage for all hours worked in excess of forty per week. (See, 12 NYCRR §142-2.2). In a similar fashion to the exemption contained in the FLSA, workers "employed on a farm" are exempted from this state law requirement and need not be paid a rate greater than the minimum wage for hours worked in excess of forty in one week. (See generally, 12 NYCRR §190).

Although workers "employed on a farm" are exempted from the state Labor Law's overtime requirements, the term "employed on a farm does not include services performed in connection with commercial canning, freezing, grading or other processing of any agricultural or horticultural commodity *not raised on the employer's farm.*" (12 NYCRR §190-1.3(h)). (emphasis added). Therefore, employees who are engaged in processing agricultural commodities not raised on their employer's farm do not fall within the Labor Law's definition of "employed on a farm" and are therefore not exempt from the requirement that they be paid at least one and one half times the minimum rate of wages for all hours worked in excess of 40 per week. While employees at the [redacted] Companies process [redacted] potatoes, a significant percentage of the potatoes processed are those that are grown by other farms around the state and country. Such labor, therefore, constitutes non-exempt work for which overtime must be paid in accordance with the Labor Law.

While there is no available case law at the state level establishing an employer's obligation to pay overtime to employees engaged in both exempt and non-exempt activities during the same workweek, federal courts have issued rulings on this subject in cases interpreting the Fair Labor Standards Act. Those courts have held that an employee's performance of both exempt and non-exempt activities during the same workweek "defeats any exemption that would otherwise apply." (See, Skipper v. Superior Dairies, Inc., 512 F.2d 409 (5th Cir. Fla. 1975); see also, Hodgson v. Wittenburg, 464 F.2d 1219 (5th Cir. 1972); Brennan v. Six Flags Over Georgia Ltd., 474 F.2d 18 (5th Cir. 1973); Wyatt v. Holtville Alfalfa Mills, Inc., 106 F. Supp. 624 (D.Cal. 1952), remanded, 230 F.2d 398 (9th Cir. 1955); Crooker v. Sexton Motors, Inc., 469 F.2d 206 (1st Cir. 1972).) In other words, where an employee, in the same workweek, performs both exempt and non-exempt work, none of the work performed that week is exempt. (See e.g., Marshall v. Gulf and Western Industries Inc., 552 F.2d 124 (5th Cir. 1977)). Using these decisions to provide guidance on the question at hand, the Department finds in this case, when an employee engages in any amount of work during a workweek for the commercial canning, freezing, grading, or other processing of potatoes not grown at [redacted] Farms, that employee must be paid overtime at a rate no less than one and one half times their regular rate of wages for all overtime work.

Your letter of August 21, 2008, asks whether [redacted] would be required to pay overtime only when the hours worked on non-[redacted] potatoes exceeded 40 hours per week for any employee. Please be advised that for the reasons discussed above, such a payment scheme would violate the state Labor Law since employees processing any potatoes during a workweek grown on a farm other than that of the employer, [redacted], are not exempt from the applicable overtime requirements and further, based upon the reasoning found in the cases cited above, performing *any* non-exempt work during the work week requires the overtime rate to be paid on *all* overtime work performed in the week.

Your August 21, 2008 letter also asks whether the documentation attached to your letter is sufficient to calculate the amount of overtime that must be paid to your employees. Please be advised that the documentation attached to your letter is insufficient to determine whether each individual employee was engaged in exempt work, non-exempt work, or a combination of both non-exempt and exempt work. Overtime exemptions should be narrowly construed against the employer, upon which the burden rests to show that it comes within exemption. (See, Shultz v Louisiana Trailer Sales, Inc. 428 F.2d 61 (5th Cir. 1970), cert den 400 US 902 (1970); Hearnsberger v Gillespie, 435 F2d 926 (8th Cir. 1970); Hodgson v Colonnades, Inc. 472 F.2d 42 (5th Cir. 1973); Brennan v Yellowstone Park Lines, Inc., 478 F.2d 285(10th Cir. 1973), cert den 414 U.S. 909 (1973)). Absent documentation meeting such a burden all employees will be deemed to be engaged in a combination of exempt and non-exempt work and, therefore, covered by the Labor Law's overtime provisions.

Your letter of August 21, 2008 also asks about the record keeping requirements contained in the Labor Law with regard to overtime wages. In general, Section 195(4) of the Labor Law requires that an employee keep records showing the "hours worked" by each employee and Section 661 of the Labor Law, which is substantially similar to the record-keeping requirements contained in the Federal Fair Labor Standards Act, requires that an employer keep "true and accurate records of hours worked by each employee covered by an hourly minimum wage rate." As stated above, an employer seeking to assert that an employee is subject to an exemption bears the burden of proving the claimed exemption. (See, Martin v. Malcolm Pirnie, Inc., 949 F.2d 611, 614 (2d Cir. 1991) (citations omitted), cert. denied, 506 U.S. 905 (1992); see also, Reich v. State of Wyo., 993 F.2d 739, 741 (10th Cir. 1993) ("the employer must show the employees fit 'plainly and unmistakenly within [the exemption's] terms'"), citing Arnold v. Kanowsky, Inc., 361 U.S. 388, 392 (1960)). Contemporaneous records indicating the origin of potatoes processed by individual employees, on an hourly basis, may be sufficient to meet such a burden, should the records indicate that certain employees did not perform work on potatoes grown on farms other than those owned by the [redacted] Companies.

Finally, your letter of August 21, 2008 asks how the New York State Department of Labor could apply these principles in requiring overtime payments absent guidelines from the Department indicating how records should be kept. 12 NYCRR §142-2.6 provides sufficient guidelines for employers to maintain the records necessary under the minimum wage and overtime provisions of the Labor Law. 12 NYCRR §190-8.2 provides additional guidelines for employers of farm workers. Furthermore, as you may be aware, it is well-settled that ignorance of the law is not a valid reason for a failure to abide by it. (See e.g., Ratzlaf v. U.S., 510 U.S. 135, 149 (1994); U.S. v. Freed, 401 U.S. 601, 612 (1971) (Brennan, J., concurring); Minnesota v. King, 257 N.W.2d 693, 697 (1977)). The fact that a violation of the Labor Law is unintentional and based on a mistaken belief of what is required does not have any relevance in determining the amount of moneys owed to individual employees. It does, however, become a factor when the Department of Labor calculates the amount of civil penalty assessed.

Wage Deductions for Utilities

While your letter of August 21, 2008 indicates that you have accepted the Department of Labor's findings concerning the deduction of wages, the following discussion further explains wage deductions under the Labor Law. As you have undoubtedly been told by the Division of Labor Standards, a wage deduction for utilities associated with housing provided by an employer is in violation of Labor Law §193. Section 193 of the Labor Law provides, in full:

> § 193. Deductions from wages
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> 1. No employer shall make any deduction from the wages of an employee, except deductions which:
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> a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or
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> b. are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises. Such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.
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> 2. No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section.
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> 3. Nothing in this section shall justify noncompliance with article three-A of the personal property law relating to assignment of earnings, nor with any other law applicable to deductions from wages.

In two recent decisions, the New York Court of Appeals has held that Labor Law §193(1)(b) requires a valid wage deduction to be authorized in writing by the employee and be either a deduction for one of the purposes specifically authorized by that section or for a purpose "similar" to one of those specifically authorized (See, Marsh v. Prudential Securities, Inc., 1 NY3d 146 (2003); Matter of Angello v. Labor Ready, Inc., 7 NY3d 579 (2006)). Furthermore, the Court of Appeals has specifically held that "subtracting from wages a [payment] that goes directly to the employer or its subsidiary violates both the letter of the statute and the protective policy underlying it" (Id. at 586).

Labor Law §193(1)(a) provides that an employer may make a deduction from the wages of an employee only when it is in accordance with the provisions of any law or any rule or

regulation issued by any governmental agency. Currently there is no provision of any law or any rule or regulation issued by any governmental agency specifically authorizing wage deductions for the payment of utilities to an employer providing housing to an employee. In regard to section 193(1)(b), a wage deduction for the repayment to an employer of utilities is not for one of the purposes authorized by section 193(1)(b), nor is it similar to any such purpose, nor may a payment directly from an employee to the employer be permitted. Accordingly, a wage deduction for such a purpose is a violation of Labor Law §193.

Alternatively, 12 NYCRR §190-3.1, which provides for allowances under the Minimum Wage Order for Farm Workers, states, in relevant part, as follows:

> The following amounts may be considered as part of the basic minimum wage rate if the items shown below are provided to the employee:
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> (b) Lodging and utilities. (1) Migrant seasonal employees. No allowance for lodging and utilities shall be considered as part of the minimum wage for a migrant seasonal employee.
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> (2) All other employees--$ 15 per week until January 1, 1991; $ 16.95 per week on and after January 1, 1991; $ 18.95 per week on and after January 1, 1992 for single occupancy or $ 10 per week until January 1, 1991; $ 11.30 per week on and after January 1, 1991; $ 12.65 per week on and after January 1, 1992 per employee for multiple occupancy. When a house or apartment and utilities are furnished by an employer to an employee, a fair and reasonable amount may be allowed for such facilities, which amount shall not exceed the lesser of either the reasonable value of comparable facilities in the locality, or $ 2.70 a day until January 1, 1991; $ 3.00 a day on and after January 1, 1991 $ 5.00 a day on and after January 1, 1992 for an individual employee and $ 6.00 a day on and after January 1, 1991; $ 8.00 a day on and after January 1, 1992 when the employee's family resides with the employee.

In many cases, allowances for lodging and expenses are not considered to be a "deduction," but rather a credit that may be applied toward an employee's wages to meet the minimum wage required by the Labor Law. However, the regulation clearly provides that "no allowance for lodging or utilities shall be considered part of the minimum wage for a migrant seasonal employee." A letter to Geoff Palmer, Legislative Liaison with the Department of Labor, on June 30, 2008 from [redacted] indicated that the workers for which housing was provided were migrant seasonal workers. Therefore, for lodging and utilities, no allowance may be considered to be part of the minimum wage paid to these workers. Such a determination is consistent with the investigation and determination issued by the Division of Labor Standards. Therefore, any allowance or deductions from wages for utility expenses taken was in violation of the Labor Law.

This opinion is based upon the information provided in your letters to the Department. 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, or if you have any additional facts to present which you believe may alter the above analysis, please feel free to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By: Jeffrey G. Shapiro
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