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

VIA FAX AND MAIL

December 11, 2009

[redacted]

Re: Request for Opinion
[redacted] – Minimum Wage
File No. RO-09-0173

Dear [redacted]:

This letter is written in response to your fax of December 8, 2009 in which you request an opinion on behalf of Mr. [redacted] Please be advised that the New York State Labor Law does not bar Mr. [redacted]'s son from working in the State of New York under the described circumstances.

In his memo of November 25, 2009, Mr. [redacted] states that his son, [redacted], is employed by an Australian law firm as a legal researcher. The Australian law firm wishes to second [redacted] to a New York law firm for six to eight weeks to gain experience in researching United States law and legal issues. Mr. [redacted] describes the work that will be performed in New York as being for the ultimate benefit of the Australian law firm. He states twice in his memo that the Australian law firm will pay [redacted] for the work he performs in New York.

Mr. [redacted] asks whether there is a conflict between [redacted]'s visa and the New York State Labor Law. He states that [redacted]'s visa permits him to work in the United States, but not to be paid in New York for that work. The New York law firm has advised [redacted] and the Australian law firm that it will not permit him to work for them unless it receives written confirmation from this Department that the New York State Labor Law does not require it to pay [redacted] for the work performed. Please be advised that, for the reasons set forth below, the New York law firm does not have to pay [redacted] for the work performed provided that he receives payment of at least the minimum wage from the Australian law firm.

"Employer' is defined in New York State Labor Law §190(3) as "any person, corporation or association employing any individual in any occupation, industry, trade, business or service." Labor Law §2(7) defines "employed" as "suffered or permitted to work." The federal Fair Labor Standards Act (FLSA) has similar definitions of these terms (29 USC §230(g)) and it is

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well-settled that the test for determining whether a person or entity is an "employer" is the same under both the New York State Labor Law and the FLSA (*Chu Chung v. The New Silver Palace Restaurant, Inc.*, 272 F. Supp.2d 314, 319, fn 6 (SDNY 2003)). Among the criteria of such a test are "whether the alleged employer: (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (*Herman v. RSR Security Services Ltd.*, 172 F. 3d 132, 139 (2nd Cir. 1999)). When applying this test, "no one of the four factors standing alone is dispositive. Instead, the 'economic reality' test encompasses the totality of the circumstances, no one of which is exclusive" (*id*). In regard to the second criteria, the courts have repeatedly held that employer status does not require continual monitoring of employees or any sort of absolute control. Instead, control "may be restricted or exercised only occasionally" (172 F.3d at 139). Furthermore, it is well-settled that an employee may have more than one employer (*Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61 (2nd Cir. 2003)).

The facts provided lead to the conclusion that [redacted] will be employed by both the New York law firm and the Australian law firm during his time in the United States. There is nothing in the New York Labor Law that requires a person employed by joint employers to be paid by one employer or the other or both. The only requirement is that the employee be paid for all work performed. In this case, Mr. [redacted] has twice stated that [redacted] will be paid by the Australian law firm for all work performed by him for the New York law firm. Provided that the Australian law firm does, in fact, pay [redacted] and that such pay is equal to or greater than the minimum wage, the New York law firm will not be required to pay [redacted] for such work.

This opinion has been provided on the basis of the facts set forth in Mr. [redacted]'s memo of November 25, 2009. A different opinion might result if the circumstances outlined in such memo change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please feel free to contact me.

Very truly yours,

Jeffrey G. Shapiro
Associate Attorney

JGS:mp

cc: Carmine Ruberto
[redacted]