



New York State Department of Labor

Eliot Spitzer, Governor

M. Patricia Smith, Commissioner

September 12, 2007



Re: Request for Opinion
Employment Classification
File No. RO-07-0093

Dear [REDACTED]:

I have been asked to respond to your letter of August 31, 2007 in which you set forth various duties of "assistant managers" working for your client and ask, based on such description, whether such individuals are exempt from the definition of "employee" set forth in Labor Law §652 and 12 NYCRR Part 142-2.14. However, you have not provided enough information for a determination that your client's assistant managers do or do not work in an "executive" or "administrative" capacity.

Please be advised that this Department cannot render a definitive opinion as to the classification of these workers merely from reading a job description, especially when, as you state, their duties "include, but are not limited to" those listed. As described below, the classification of a worker as "executive" or "administrative" requires, in significant part, a determination of the worker's "primary duty." It is necessary, therefore, to determine the amount of time, if any, spent by the worker on duties other than those in an "executive" or "administrative" capacity before assigning him/her to one of those classifications, (*e.g. Donovan v. Burger King Corp.*, 675 F.2d 516 (2nd Cir. 1982)). Accordingly, it is necessary, before making such a definitive determination, to perform an inspection of the business at issue including, but not limited to, interviews with the allegedly affected workers to determine exactly what tasks are performed and the amount of time spent on each task, rather than simply relying on a written job description.¹ If you wish such a definitive opinion, please provide the name, address and telephone number of your client so that the Division of Labor Standards may schedule such an inspection.

Furthermore, even if the workers in question performed only those tasks listed in the job descriptions, such descriptions are not sufficient for a determination.

¹ "The District Judge, however, rightly looked to what Burger King did rather than what it said," (675 F.2d at 519).

Regulation 12 NYCRR §142-2.14(4)(i) excludes from the definition of "employment" any person working in an "executive" capacity, defined as follows:

(i) Executive. Work in a *bona fide executive . . . capacity* means work by an individual:

(a) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;

(b) who customarily and regularly directs the work of two or more other employees therein;

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;

(d) who customarily and regularly exercise discretionary powers; **and**

(e) who is paid for his services a salary of not less than:

(1) \$386.25 per week on and after March 31, 2000, inclusive of board, lodging, other allowances and facilities;

(2) \$450.00 per week on and after January 1, 2005, inclusive of board, lodging, other allowances and facilities;

(3) \$506.25 per week on and after January 1, 2006, inclusive of board, lodging, other allowances and facilities; and

(4) \$536.10 per week on and after January 1, 2007, inclusive of board, lodging, other allowances and facilities. (Emphasis added)

The use of the term "and" in §142-2.14(i)(d) must be interpreted to mean that the five criteria set forth in §142-2.14(i)(a-e) must all be present before classifying a worker as an exempt "executive." In the present matter, you have not claimed that the "primary duty" of your client's assistant managers is the management of the enterprise in which they are employed (§142-2.14(i)(a)). You have merely stated that your client's assistant managers assist the store

managers with day-to-day operations and are responsible for the stores in the managers' absence (i.e. at least two days a week). As you provided no basis for a determination that management of the store is an assistant manager's primary duty, such a person cannot be classified as an executive. Furthermore, although you have stated that these assistant managers make recommendations for hiring, firing and promotion, you have provided no basis for a finding that these recommendations are given any "particular weight" (§142-2.14(i)(c)). Also, all the duties of an assistant manager listed by you could be performed in accordance with set company policies and procedures, or within guidelines set by the store managers. Accordingly, there is no indication that assistant managers "customarily and regularly exercise discretionary powers" (§142-2.14(i)(d)). In addition, although you state that assistant managers "earn" in excess of \$536.10 per week, §142-2.14(i)(e)(4) clearly states that workers must be paid a "salary" in excess of such amount. It is this Department's opinion that a salary, a set amount paid each week regardless of the number of hours worked, is different from an hourly wage. An assistant manager who earns an hourly wage is not being paid a salary as required by §142-2.14(i)(e)(4), regardless of the amount of such wage. Therefore, it is not possible to determine, from the facts provided by you, whether assistant managers earn in excess of \$536.10 per week as a salary or as an hourly wage. For all these reasons, your client's assistant managers cannot be classified as working in an executive capacity based upon the facts provided.

Regulation 12 NYCRR §142-2.14(4)(ii) also excludes from the definition of "employment" any person working in an "administrative" capacity, defined as follows:

(ii) Administrative. Work in a *bona fide . . . administrative . . . capacity* means work by an individual:

(a) whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general operations of such individual's employer;

(b) who customarily and regularly exercises discretion and independent judgment;

(c) who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (*e.g.*, employment as an administrative assistant); or who performs, under only general supervision, work along specialized or technical lines requiring special training, experience or knowledge; **and**

(d) who is paid for his services a salary of not less than:

(1) \$386.25 per week on and after March 31, 2000, inclusive of board, lodging, other allowances and facilities;

(2) \$450.00 per week on and after January 1, 2005, inclusive of board, lodging, other allowances and facilities;

(3) \$506.25 per week on and after January 1, 2006, inclusive of board, lodging, other allowances and facilities; and

(4) \$536.10 per week on and after January 1, 2007, inclusive of board, lodging, other allowances and facilities. (Emphasis added).

. Once again, the use of the term "and" in §142-2.14(ii)(c) must be interpreted to mean that all four criteria set forth in §142-2.14(i)(a-d) must be present before classifying a worker as an exempt "administrator." As described above, it is not possible to determine, from the facts provided, the "primary duty" of these workers (§142-2.14(ii)(a)). As also previously noted, there is no evidence that these assistant managers "customarily and regularly exercise discretionary powers" (§142-2.14(ii)(b)). Furthermore, it is not possible to determine, from the facts provided, whether an assistant manager "regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity," (§142-2.14(ii)(c)). As you have not provided any description of the duties of the persons that assistant managers assist, it is not possible to determine whether such persons are "employed in a bona fide executive or administrative capacity." Also, for the reasons set forth above, your statement that assistant managers "earn" in excess of \$536.10 per week is not sufficient to meet the requirements of §142-2.14(ii)(d)(4). For all these reasons, your client's assistant managers cannot be classified as working in an administrative capacity based upon the facts provided.

For the above stated reasons, this Department is unable to render an opinion on this issue from the facts provided.

Please be further advised that the Freedom of Information Law request made in your letter will be responded to separately.

This opinion is based upon the information provided in your letter of August 31, 2007. 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,

Maria L. Colavito, Counsel

By: Jeffrey G. Shapiro
Senior Attorney

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cc: Carmine Ruberto