



New York State Department of Labor

Eliot Spitzer, Governor

M. Patricia Smith, Commissioner

July 31, 2007



Re: Request for Opinion
Payment of Wages
Our File No.: RO-07-0083

Dear [REDACTED]:

I have been asked to respond to your letter of July 20, 2007 in which you ask a question that you state does not pertain specifically to the restaurant industry, as did your previous requests for opinions, but presumably to all employees in general, to wit: "is it non-compliant to change an employee's hourly wage rate on a weekly basis?" You give an example in which an employee is paid \$10.00 per hour for his first week of employment, \$9.09 per hour for his second week of employment, and \$8.57 for his third week of employment. You state that the employee works at least 40 hours each week, with different amounts of overtime each week, resulting in total wages of \$400.00 for the first week, \$500.00 for the second week and \$600.00 for the third week¹. You further state that the employee's "job description" remains the same each week. You ask if this weekly change in the employee's hourly wages is "legal." Please be advised that it is not possible to answer this question except on the most general and theoretical terms.

Other than the requirements that every employee must be paid at least the minimum wage, and, if engaged in public works, paid in accordance with the "prevailing wage schedules," the State of New York has almost no law requiring employees to be paid a specific amount of wages for a specific task. The statutes that appear to be most relevant to your question are Labor Law §191(1)(a) and (d), which state that a "manual worker" and a "clerical and other worker" must be paid wages earned: with a specified frequency and "in accordance with the agreed terms of employment." In other words, other than the laws governing minimum wage and public works, there is no New York State law that says that an employer is required to pay a specific wage for a specific job or task. New York State law does provide, however, that once an employer and employee have come to an agreement (verbal, written or otherwise) that a certain wage shall be paid, the employer is required to pay that wage with the frequency mandated by Labor Law §191 and in accordance with all other applicable laws and regulations.

¹ Given the stated hours worked in each week, I note that if this employee's regular wage rate remained at \$10.00 per hour for each week, his regular wages plus overtime would total \$400.00 for the first week, \$550.00 for the second week and \$700.00 for the third week.



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While it is theoretically possible for an employer and employee to agree upon modifications to the "agreed terms of employment," even on a weekly basis, with the result that the employee is paid different wages at different rates for the same work, please take notice that this Department would scrutinize such modifications extremely closely to ascertain whether they are mutually beneficial agreements freely negotiated between two parties of equal skill, knowledge and bargaining power, or whether they are, in fact, unilateral decisions on the employer's part to vary the employee's wages for the employer's sole benefit. To chose but one possible example, this Department would consider an employer to be in violation of Labor Law §191 and various other statutes and regulations if the employer unilaterally changed an employee's "regular" hourly wage from week to week for no other purpose than to avoid (or for the primary purpose of avoiding) the necessity of paying all overtime wages that the employer would otherwise be required to pay.

This opinion is based on the information provided in your letter of July 20, 2007. A different opinion might result if the facts provided were not accurate, or if any other relevant fact was not provided.

Very truly yours,

Maria L. Colavito, Counsel

By: Jeffrey G. Shapiro
Senior Attorney

JGS:da

cc: Carmine Ruberto