



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

Dayfile

August 26, 2009

[REDACTED]

Re: Request for Opinion
Spread of Hours Pay
RO-08-0086

Dear [REDACTED]

This letter is written in response to your request for an opinion dated July 11, 2008 regarding the New York State requirements for spread of hours pay. Your letter requests an explanation and clarification of the New York State spread of hours requirements.

Regulation 12 NYCRR §142-2.4(a) states that "(a)n employee shall receive one hour's pay at the minimum hourly wage rate, in addition to the minimum wage required by this part for any day in which: (a) the spread of hours exceeds 10 hours . . . " Regulation 12 NYCRR §142-2.18 defines "spread of hours" as "the interval between the beginning and end of an employee's workday. The spread of hours includes working time plus time off for meals plus intervals off duty."

It is important to note that although New York State's requirements for meal breaks (Labor Law §162) do not require that such time be paid, Federal Regulation 29 CFR §785.18, states that

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on call time."

Accordingly, employees must be paid one extra hour in addition to his or her hourly wages if the employee works more than ten hours in one day, regardless of whether such employee received a meal period or other time off duty. However, as you correctly state in your letter, the "spread of hours" regulation does not require all employees to be paid for an additional hour, but merely that the total wages paid be equal to or greater than the total due for all hours at the minimum wage plus one additional hour at the minimum wage. Two previous opinions explaining the spread of hours requirements are also attached for your review.

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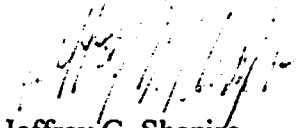
Your letter also asks whether a tip allowance may be used to satisfy the monies due an employee entitled to spread of hours wages. Regulation 12 NYCRR §137-1.7, which contains the spread of hours requirements for individuals employed in the restaurant industry, provides that "an employee shall receive one hour's pay at the basic minimum hourly wage rate *before allowances* in addition to the minimum wages otherwise required in this Part." [emphasis added.] Accordingly, employees entitled to spread of hours pay must be paid one hour's pay at the minimum wage rate, currently at \$7.25 per hour, to satisfy the spread of hours requirements, regardless of whether such employee receives a tip or any other form of allowance.

This opinion is based on the information provided in your letter of July 11, 2008. A different opinion might result if the circumstances outlined in your letter changed, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By:


Jeffrey G. Shapiro
Associate Attorney

JGS:mp
cc: Carmine Ruberto
Enclosures