



**New York State Department of Labor**

**Andrew M. Cuomo**, *Governor*

**Colleen C. Gardner**, *Commissioner*

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January 31, 2011

Re: Request for Opinion  
Paychecks  
RO-10-0096

Dear [REDACTED]:

This letter is written in response to your email dated June 22, 2010, regarding the effect of partial-day deductions on an employee's overtime status. Specifically, you inquire as to whether partial day deductions can be taken from paid time off/vacation banks for salaried, exempt employees, and whether partial day deductions for FMLA leave are permitted for salaried, exempt employees. Since your letter does not provide the specific factual basis under which your question arises, it is assumed that you are inquiring whether the above-described deductions would violate the "salary" requirement for the State and federal administrative, professional, and executive exemptions/exceptions to the overtime requirements. For the purposes of this letter, partial day deductions include charges to leave time or reductions in salary proportionate to the number of hours missed in an employee's regularly scheduled workday.

The federal Fair Labor Standards Act and the regulations under the State Minimum Wage Act require that most employees be paid at least the federal minimum wage for all hours worked and overtime pay at one and one-half times their regular rate of pay for all hours worked over 40 hours in a workweek. However, these requirements are independent of one another and operate to provide both the U.S. Department of Labor and this Department authority over the enforcement of their respective provisions. It is important to note that the FLSA does not prevent states from enacting wage and overtime laws and regulations that are more beneficial to workers than the FLSA. (See, 29 U.S.C. §218; *Manliguez v. Joseph*, 226 F. Supp.2d 377 (EDNY 2002).) Regulations adopted pursuant to the New York State Minimum Wage Act do contain some overtime requirements that apply to employees who are otherwise exempt from overtime under the FLSA. In order to reach a determination as to whether a job falls under a permitted overtime exemption, the Department may examine both the FLSA and the more stringent provisions of the State Minimum Wage law and orders. Where the criteria in a New York State exception mirror those for an exemption in the FLSA, this Department usually construes the criteria in our regulations in line with those contained in the FLSA, its regulations, and interpretations by the U.S. Department of Labor. However, this Department is not bound by the decisions and interpretations of the U.S.

Department of Labor, nor is that Department bound by this or other interpretations issued by this agency.

The New York State Minimum Wage Act generally applies to all individuals who fall within its definition of "employee." (*see*, Labor Law §651 *et seq.*) Section 651 (5) defines "employee" as "any individual employed or permitted to work by an employer in any occupation," but excludes fifteen categories of workers from that definition. (*see*, Labor Law §651(5)(a-o).) Subpart 2.2 of the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR §142-2.2) provides, in relevant part, that all "employees" must be paid at a rate not less than one and one-half times their regular rate of pay subject to the exemptions of the FLSA. Subpart 2.2 also provides that employees exempted under Section 13 of the FLSA must nevertheless be paid overtime but at a rate not less than one and one-half times the minimum wage. As alluded to above, this requirement is independent of the overtime requirements contained in the FLSA, which are not incorporated by reference; rather they operate as independent and concurrent requirements for the payment of overtime.

To qualify for these exemptions/exceptions, employees generally must meet certain tests regarding their job duties and be paid on a salary basis. While the tests for job duties differ slightly between the FLSA and the State Minimum Wage Act, the State requirement that these employees be paid a salary, notwithstanding any differences in the threshold amount of that salary, is interpreted in line with the regulations explaining the FLSA salary requirement. Those requirements are explained in Federal regulation 29 CFR 541.600 *et seq.*, which permit deductions as described in your letter without violating the salary basis test requirements. Since this Department construes the requirements of the salary basis test under the New York Labor Law in line with the 29 CFR 541.600, please be advised that both deductions described in your letter are permissible.

This opinion is based exclusively on the facts and circumstances described in your email of June 16, 2009, and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,  
Maria L. Colavito, Counsel

By:   
Michael Paglialonga  
Assistant Attorney II

cc: Carmine Ruberto