



New York State Department of Labor

Eliot Spitzer, Governor

M. Patricia Smith, Commissioner

VIA FAX AND MAIL

June 21, 2007

Re: Request for Opinion
Overtime - FLSA Exempt Workers
File No.: RO-07-0059

Dear [REDACTED]:

I have been asked to respond to your letter of June 13, 2007 in which you allege that there are grounds for a finding that your client's employees are exempt from the provisions of the Fair Labor Standards Act (FLSA) pursuant to the Motor Carrier Exemption (MCE). From this, you state that you disagree with this Department's position that your client's employees are entitled to overtime pay after the first 40 hours worked. Based upon this statement, you question why the Department "would want to question (these employees) or audit their time sheets." You therefore request that the Department refrain from an audit at this time as "unnecessary."

Please be advised that your reasoning is based upon the incorrect assumption that exemption from FLSA overtime requirements is synonymous with exemption from all New York State overtime requirements. Actually, New York State regulations provide that an FLSA exemption merely requires payment of overtime wages at a different rate, not a negation of all obligation to pay overtime.

FLSA §18 (29 USCA §218) provides that a state may interpret its own laws and regulations to provide greater protections and benefits to workers than does the FLSA. New York State regulation 12 NYCRR §142-2.2 provides that an employer shall pay an employee overtime at a rate of one and one-half times his/her regular pay subject to the exemptions of the FLSA. Such regulation goes on to state that "an employer shall pay employees subject to (the FLSA exemptions) overtime at a wage rate of one and one-half times the minimum hourly rate." In other words, employees in New York State who work more than 40 hours per week must be paid for such hours at one and one-half times their regular rate of pay unless they fall into one of the exemptions listed in the FLSA, in which case they must be paid overtime at a rate of one and one-half times the minimum wage.

Phone: (518) 457-4380 Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

Accordingly, it is not accurate to argue, as you do, that there is no need to pay overtime wages to FLSA-exempted employees. Therefore, even if the employees at issue are subject to the claimed FLSA exemption (and nothing in this letter should be interpreted as an admission or agreement that the MCE is applicable to these employees) the Department is still empowered to investigate conditions at this site, including but not limited to whether payment of overtime wages due is being, and has been, made (*see* Labor Law §21(2)).

For the above stated reasons, it is the opinion of the Department of Labor Counsel's Office that your request that the Department "refrain from an audit at this time" should be denied. Please advise your client to cooperate with the Division of Labor Standards' investigation of this matter to the full extent required by law and regulation, including but not limited to Labor Law §§25, 26, 31, 32, and 12 NYCRR §142-2.6(d).

This opinion is based upon the information provided in your letter of June 13, 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

cc: Carmine Ruberto

JGS: