



New York State Department of Labor

David A. Paterson, Governor

M. Patricia Smith, Commissioner

---

December 2, 2009



Re: Request for Opinion  
Call-In Pay  
RO-09-0133

Dear [REDACTED]

This letter is written in response to your email of September 23, 2009 in which you request an opinion as to the manner in which the Department of Labor determines compliance with the call-in pay provision in regulation 12 NYCRR §142-2.3. Attached to your email was an opinion letter from this office dated May 12, 2006 [RO-05-0103] from Senior Attorney Benjamin T. Garry which states, in relevant part to your inquiry, that "the Department of Labor computes the total minimum wage due to an employee for the workweek and compares it with the compensation actually received for that workweek." Your letter asks whether that letter remains accurate as to the Department's current method of determining compliance with the call-in pay provision. Please be advised that the letter accurately reflects the Department's current methodology for computing call-in pay.

Regulation 12 NYCRR §142-2.3, which is entitled "Call-in pay," provides, in full, that "[a]n employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage." That regulation applies to all employees covered by the Miscellaneous Wage Order, regardless of their agreed rate of pay. However, since Regulation 12 NYCRR §142-2.9 provides that the basis for the minimum and overtime wage payment required by the Miscellaneous Wage Order shall be weekly, the call-in pay provision only requires additional payment where an employee's wages for the workweek are less than the minimum and overtime wage rate for all hours worked plus any call-in pay owed. In other words, if the amount paid to an employee for the workweek exceeds the minimum and overtime rate for the number of hours worked and the minimum wage rate for any call-in pay owed, no


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

additional payment for call-in pay is required during that workweek. Accordingly, in line with the reasoning expressed above, the opinion expressed in the letter attached to your email remains accurate as to the method of determining compliance with Regulation 12 NYCRR §142-2.3.

This opinion is based on the information provided in your email of September 23, 2009. A different opinion might result if the circumstances outlined in your letter change, 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