



New York State Department of Labor  
David A. Paterson, Governor  
Colleen C. Gardner, Commissioner

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August 30, 2010

[REDACTED]

Re: Request for Opinion  
Travel Time  
RO-10-0134


Dear [REDACTED]:

This letter is written in response to yours dated August 23, 2010, in which you request clarification as to the rules involving the requirements for payment of wages for travel time. Your letter states that your daughter works for a clothing store and was notified by her store manager that she would be required to travel from Albany to Boston to prepare for an opening of a new store, but that she would not be paid for the time spent traveling. Enclosed please find copies of several recent opinion letters of this Department discussing the law in New York regarding the compensation of travel time. Based on an application of the standards enunciated therein, it appears that your daughter's employer may have acted in violation of the Labor Law. For your convenience, I have enclosed a claim for unpaid wages form which may be submitted to the Department's Division of Labor Standards at the following address:

Division of Labor Standards  
State Office Campus  
Building 12, Room 185C  
Albany, NY 12240

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 I

CC: Carmine Ruberto

Enclosures: RO-09-0023, RO-09-0190, and RO-10-0068.  
Claim for Unpaid Wages Form

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



New York State Department of Labor  
Division of Labor Standards

Claim for Unpaid Wages

Please answer all questions on both sides - please print clearly

For Office Use Only

W

Identification Number

Refer to wage suppl. I D. No. if any

Taken By

Section 190.7 of the New York State Labor Law excludes from wage payment coverage those persons in an administrative, executive or professional capacity whose earnings exceed \$900 gross per week

**Note: It is necessary for you to have asked for the wages due before we can assist you.**

1. Your Full Name <input type="checkbox"/> Ms. <input type="checkbox"/> Mrs. <input type="checkbox"/> Mr.			3. Social Security No.		
2. Your Address Apt. No. City, Town or Village County Zip Code			4. (Area Code) Telephone No. Day ( ) Evening ( )		
5. Claim against (Trade Name of Employer)			6. Corporation Name, if any		
7. Address of main office or headquarters of firm City, Town or Village County Zip Code			8. (Area Code) Telephone No. ( )		
9. Names and addresses of responsible persons of firm			Their positions		
10. Kind of business firm engaged in			11. Is firm still in business? <input type="checkbox"/> Yes <input type="checkbox"/> No		
12. What was your work or occupation with this firm?			13. Address where you worked Zip Code		
14. Date Hired		15. Name and Position of person hiring you		16. Name of superintendent, manager or foreman	
17. Latest agreed rate of pay (per hour per week, per day)		18. Last Day Worked		19. Status with Firm <input type="checkbox"/> I quit <input type="checkbox"/> I was discharged <input type="checkbox"/> I was temporarily laid off <input type="checkbox"/> I am still employed	
20. Reason for quitting, discharge or layoff					
21. Were you a member of any union when employed by this firm? <input type="checkbox"/> Yes <input type="checkbox"/> No		If "yes", give name, local no., address, zip code and telephone no. of union			
22. Have you asked your union for assistance? <input type="checkbox"/> Yes <input type="checkbox"/> No		If "yes" what action has the union taken?			
<b>Before answering questions 23 and 25, first fill out back of this form to help you figure wages due</b>					
23. Wages claimed for period (first date to last date) From To Inclusive		24. Name and address of employer's bank Zip Code		25. Total amount of wages due \$	
26. Did you request these wages? <input type="checkbox"/> Yes <input type="checkbox"/> No		27. Date of Request		28. To whom was the request made?	
29. Did employer refuse to pay for these wages? <input type="checkbox"/> Yes <input type="checkbox"/> No		If "yes", give employer's reason for refusal			
30. Were any payments due you paid by checks returned not honored? No <input type="checkbox"/> Yes <input type="checkbox"/> If "yes", submit photocopies of check(s)					
31. How were wages paid? <input type="checkbox"/> Cash <input type="checkbox"/> Check <input type="checkbox"/> Other (Explain)			32. What was your normal payday? What period did this cover?		

Any false statements knowingly made are punishable as a class A misdemeanor (Section 210.45, the New York State penal law). I affirm that the above statements are true.

I authorize the Commissioner of Labor, deputies or agents to receive, endorse my name on, and deposit in the account of the Commissioner of Labor any checks or money orders made out to me as payment on this claim.

Signature of Claimant

Date

(Continue Over)

Commission Salesperson - Note:

Claims for wages should be recapitulated on Form LS-223.1 (Commission Salesperson Summary Sheet) indicating (1) average weekly earnings including salary, draw and commission; (2) terms of contract and (3) for commissions claimed to be owing, the date of sale, customer's name, amount of sale, rate of commission and commission due.

All other employees: Wages claimed on other side are to be computed as follows:

33. Payroll week ending date	34. Number of hours worked this week	35. Number of days worked this week	36. Rate of pay (show whether by hour, day, week or month)	37. Total gross wages* earned this week	38. Gross wages paid to you this week	39. Difference between gross wages earned & gross wages paid to you this week	40. If wages were paid by check(s) not honored enter the check number(s)
			\$        per	\$	\$	\$	
41. Total Amount Due						\$	

\*Gross wage is the amount before taxes or other monies are deducted.

42. Include any additional information below:



New York State Department of Labor  
David A. Paterson, Governor  
Colleen C. Gardner, Commissioner

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August 10, 2010

[REDACTED]

Re: Request for Opinion  
Travel Time – 12 NYCRR 142.2(b)  
RO-09-0190

Dear [REDACTED]:

I have been asked to respond to your letter of December 31, 2009 in which you ask three questions regarding the rights and obligations of employers to pay traveling employees pursuant to regulation 12 NYCRR §142-2.1(b). The questions posed in your letter are addressed specifically below.

As background for addressing these questions, please be advised that subsection 2.1(b) of the Minimum Wage Order for Miscellaneous Industries (12 NYCRR §142-2.1(b)) states, in relevant part, that the minimum wage shall be paid for "time spent in traveling to the extent that such traveling is part of the duties of the employee." Additionally, Section 191 of the Labor Law requires the payment of wages at an employee's agreed rate of pay for all hours worked within a specified time period. In determining whether the time spent traveling is counted as time worked, the time must be considered part of the "duties of the employee" as stated above in 12 NYCRR §142-2.1(b). This Department has previously held that where an employee is not completely relieved from duty and cannot effectively use the time for his own purposes without restrictions, such time must be considered part of the "duties of the employee." Accordingly, the wage rate for time traveled must be determined in the scope of whether it constitutes part of the "duties of the employee" and then compensation is to be based upon the agreed rate of pay.

Generally, so long as the activity is "an integral part of and indispensable to the various \*\*\* activities for which they were principally employed" the activity is considered within the scope of the duties of the employee. (*Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706, 718. (C.A.2 (N.Y.), 2001, quoting *Mitchell v. King Packing Co.*, 350 U.S. 260, 76 S.Ct. 337, 100 L.Ed. 282 (1956) internal quotations omitted).) Furthermore, the Department

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interprets the language of 12 NYCRR §142-2.1 in line with the federal regulations regarding travel time under the Fair Labor Standards Act. (29 CFR §785.33 et seq.)

In this context, the answers to your questions are as follows:

1) *Does this regulation [12 NYCRR §142-2.1] mean that, when the employer sends the employee on a trip to another store outside of the employee's usual location, the employee must be compensated at the minimum wage for all hours of travel to and from the airport and while traveling on the plane, car, bus or train?*

The answer to this question depends upon the nature and length of the travel, which you do not provide. The regulation provides that employees must be paid not less than the minimum wage rate for time worked or time spent within the scope of work, such as traveling. So long as the time is within the scope of the employee's duties and is required for the proper performance of those duties, the employer must compensate for that time. Unfortunately, since your letter does not describe the nature and length of the travel, no definitive answer to this question can be provided. I suggest you consult federal regulations 29 CFR §785.33 et seq. for more information in this regard.

2) *Since these employees are paid \$30 per hour, well-above the minimum wage, the employee is in almost each instance earning well-above the minimum wage for all hours worked, even including travel time. Is this regulation satisfied if the employee is earning more than minimum wage for each hour worked including travel, or must [may] the employer pay for example, \$7.50 for travel time, on top of \$30 per hour for all of the employee's other hours?*

This question proposes having a different rate of pay for all time the employee spends traveling from that of regular hours worked. Section 195(1) of the Labor Law provides, in relevant part, that "[e]very employer shall . . . notify his or her employees, in writing, at the time of hiring of the rate of pay and of the regular pay day designated by the employer in accordance with section one hundred ninety-one of this article, and obtain a written acknowledgment from each employee of receipt of this notice." Labor Law §195(2) provides that "[e]very employer shall . . . notify his employees of any changes in the pay days prior to the time of such changes." The Department interprets these provisions to require employers to provide employees with clear and effective advance notification of any change in pay before such changes are implemented. Furthermore, the Department also interprets the statute as prohibiting any retroactive reductions in pay. Therefore, so long as the "travel pay rate" is clearly and effectively communicated to the employee in compliance with Labor Law §195, does not impose retroactive reductions in pay already earned, nothing in the Labor Law prohibits an employer from paying its employees in the manner in which you describe.

3) *The overtime regulation provides "[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate." See 12 NYCRR 142-2.2. If the traveling hours are overtime hours, can the employer pay time-and-a-half of the minimum wage for the overtime hours which consists of traveling?*

No. All overtime must be paid at a rate not less than one-and-one half the employee's regular rate of pay. The language you quote in Section 142-2.2 requires overtime to be based on an employee's "regular rate." The term "regular rate" is defined as the amount that the employee is regularly paid for each hour of work. Since the employees described in your letter are paid a regular hourly rate of thirty dollars per hour, their overtime rate of pay is one and one-half times that, or forty-five dollars per hour. It is also worth noting that Section 142-2.2 provides that employees who are exempt from the overtime requirements of the Federal Fair Labor Standards Act are required to be paid overtime at a rate not less than one and one half times the minimum wage rate for all overtime hours worked. Employees exempt from the overtime requirements of the Fair Labor Standards Act may be paid, in accordance with your question, at one and one half times the minimum wage for overtime hours that consist of traveling.

This opinion is based exclusively on the facts and circumstances described in your facsimile request letter dated December 31, 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: 

Jeffrey G. Shapiro  
Associate Attorney

cc: Carmine Ruberto



New York State Department of Labor  
David A. Paterson, Governor  
Colleen C. Gardner, Commissioner

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May 7, 2010



Re: Request for Opinion  
Hours Worked  
Travel Time  
RO-10-0068

Dear [REDACTED];

This letter is written in response to your letter dated April 23, 2010, in which you request an opinion as to whether you are entitled to compensation for certain hours spent traveling as part of your job as a technician for a large company based in Flushing, New York. Your letter states that the company operates a large fleet of commercial trucks which it requires its employees to park at their own residence or at a rented parking space that the company pays for. You state that you are unable to park the truck at your residence due to a local ordinance and that you park it at a rented parking spot. The location of your "first stop" and start time changes every day, depending on where you are assigned. The length of travel from the parking space where the truck is parked can vary from as short as 20 minutes to as long as 1.5 hours to reach your "first stop." You state that you are an hourly employee and that the company does not begin paying you until you reach the "first stop," which has to be verified by phone and GPS installed on the truck. Your letter asks for an opinion as to whether you are entitled to compensation for the travel time between the parking spot and the "first stop," and between the "last stop" and the parking spot.

State regulation 12 NYCRR §142-2.1 requires, in relevant part, that the minimum wage is required to be paid for "time spent in traveling to the extent that such traveling is part of the duties of the employee." Furthermore, Section 191 of the Labor Law, which sets the frequency of the payment of wages for all hours worked, has been interpreted by this Department to require the payment of wages at an employee's agreed rate of pay for all hours worked. Accordingly, the central issue presented in your letter is whether the time spent traveling from the parking space to your "first stop," and from your "last stop" back to the parking spot at the end of the day is time worked that must be paid at your regular rate of pay, which cannot be less than the minimum wage rate.

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With regard to determining whether travel time constitutes "hours worked," the New York State Department of Labor interprets the quoted language in regulation 12 NYCRR §142-2.1 and the requirements of Section 191 in line with the federal regulations for travel time. As relevant to your inquiry, federal regulation 29 CFR §785.38 provides, in full, as follows:

**§785.38 Travel that is all in the day's work.**

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (Walling v. Mid-Continent Pipe Line Co., 143 F. 2d 308 (C. A. 10, 1944))

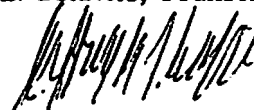
Accordingly, since you are required to report to the parking space at the beginning of the day to pick up the truck and return the truck to the parking space at the end of the day, the time you spend commuting from the parking space to your first stop and the time you spend returning the truck to the parking space from your last stop must be counted as hours worked. Accordingly, it appears that your employer is acting in violation of the requirements of the New York State Labor Law in failing to pay you for such time. Since your letter indicates that you are already in receipt of a claim for unpaid wages form, I suggest you file a completed copy of that form with the Division of Labor Standards at your earliest possible convenience.

This opinion is based on the facts set forth in your letter dated April 23, 2010. 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





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

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March 10, 2009



Re: Request for Opinion  
Compensable Travel Time  
RO-09-0023

Dear [REDACTED]:

This letter is in response to your email of February 13, 2009, in which you ask whether employees who conclude an 8 a.m. – 4 p.m. shift and work an additional overtime shift at a different site beginning at 4:30 p.m. must be compensated for their thirty minute travel between job sites. Your letter references a 1966 U.S. Department of Labor opinion letter which states, based on the factual circumstances presented, that the exclusion from hours worked of the time spent in travel from one plant to another, between a regular and an overtime shift, from hours worked would not be in violation of the Fair Labor Standards Act.

In interpreting the New York State Labor Law, and the regulations adopted thereto, the New York State Department of Labor ("Department") is not bound by the United States Department of Labor's interpretations of the Federal Fair Labor Standards Act. The Fair Labor Standards Act expressly permits states to enforce state Labor Laws that benefit or protect employees to a greater degree than do the provisions of the Federal Law. (*see* 29 USC 218(a)) Therefore, the U.S. Department of Labor's 1966 letter has no relevance to this Department's interpretation of New York State Law.

Subsection 2.1(b) of the Minimum Wage Order for Miscellaneous Industries (12 NYCRR §142-2.1(b)) states, in part, that:

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling *to the extent that such traveling is part of the duties of the employee.* [Emphasis added]

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In determining whether time spent in traveling is counted as time worked, the time must be considered part of the "duties of the employee." Where an employee is not completely relieved from duty and cannot effectively use the time for his own purposes without restrictions, such time must be considered to be part of the "duties of the employee." Such a situation is of the same kind as an employee being "on-call," as opposed to time in which the employee is "subject to call." In general, when an employee is "subject to call," only the hours actually worked are considered to be working time, while all "on call" time is considered working time.

"Subject to call" time is that time during which employee are free to leave and engage in personal pursuits and activities. In such situations, working time starts when they are actually ordered to a specific assignment. "On call" time is time during which the employee is not free to leave or engage in personal pursuits, and is awaiting the need for the immediate performance of their assigned duties. Therefore, a period during which an employee is completely relieved from duties for long enough to enable him/her to use the time effectively for his/her own purposes is not considered time worked. (see 29 CFR §785.6.)

In the present situation, the employees travel time between work sites must be considered time worked since the employees in question are required to travel between job sites in the time period between the shifts and are, therefore, not free to leave or engage in personal pursuits and activities. Since the situation you describe involves a thirty minute window in which the employees must travel from one job site to the other, the entire thirty minute period must be considered time worked.

The travel time between shifts described above should be distinguished between travel time at the beginning and end of the workday, since such time does not have to be counted as time worked since the employee is free engage in personal pursuits and activities.

This opinion is based on the information provided in your email of February 13, 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

A handwritten signature in cursive script that reads "Jeffrey Shapiro/da".

By: Jeffrey G. Shapiro  
Associate Attorney

JGS:da

cc: Carmine Ruberto