



New York State Department of Labor

Eliot Spitzer, Governor

M. Patricia Smith, Commissioner

February 21, 2008

[REDACTED]

Re: Request For Opinion
Exempt Employees
File No.: RO 07-0131

Dear [REDACTED]:

This letter is written in response to your request for an opinion dated November 27, 2007. Please accept my apologies for this late response to your request. You ask whether you are an exempt employee and whether you are entitled to "on-call" pay. The duties and salary structure you describe in your letter could be either those of an exempt employee or a non-exempt employee. Therefore, further information will be necessary to determine whether you are entitled to on-call pay.

You state that you are employed by a not-for-profit corporation operating a child care center. Your job title is "Office Manager" and your duties consist of building/facility management and IT support. Your employer classified you as a non-exempt employee. For the last nine years, your home telephone number has been your employer's after-hours contact number for private security, police, fire and the local school district. You had a verbal agreement with your employer that you would be paid for your time spent in receiving and taking appropriate action on such phone calls at your regular hourly rate. You have apparently been paid for such time, along with "any additional time worked at the center including times (you were) not able to take a lunch break." You have now been asked to add your cell phone as a contact number. Your employer has told you that as a non-exempt employee, you are not entitled to any wages for the time you spend on-call. Your supervision has told you that in "extreme" situations you would be paid, but there has been no definition of "extreme." You ask this office to provide you with a "clear understanding of the law in New York State."

From the facts provided, it appears that your employer is a non-profit making institution organized for educational purposes. As such, it is governed by New York State Regulations 12 NYCRR Subpart 142-3, a copy of which is enclosed. All sections of that subpart, including §142-3.2 (overtime) are applicable to "employees." However, §142-3.12(c)(ii) excludes persons employed in an administrative capacity from the definition of "employee." Your described duties appear to be "administrative." A person employed in an administrative capacity is not an "employee." Therefore, there is no legal requirement that such a person be paid overtime wages or receive on-call pay.

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However, to be classified as a person employed in an administrative capacity, a worker must be paid a "salary" above a certain amount. As there is no definition in law of the term "salary," this Department uses that term's ordinary meaning, to wit: payment of the same amount every pay period no matter how many hours are worked. Although your letter states that you are "docked" wages for times when you are late or absent, your employer's written policy merely says that such time will be charged against accumulated personal or sick time. This does not constitute "docking" wages. As long as you receive the same amount of pay every week no matter how many (or few) hours that you work, you are a salaried employee.

There are portions of your letter, however, that seem to indicate that you have not been receiving a salary. You seem to state that you have received extra wages for extra hours worked. If this is true, then it is possible that you have been receiving an hourly wage, not a salary. If this is still your situation, then you would be an employee entitled to on-call pay.

For these reasons, it is not clear whether you are employed in an administrative capacity. I suggest that you contact this Department's Division of Labor Standards (914-997-9521) to request an investigation. Please take note that Labor Law §215 sets forth penalties for employers who retaliate, in any form, against workers who make such complaints.

In regard to your statement that your employer has changed a verbal agreement by requiring you to give out your cell phone number as well as your home phone number, I suggest that you contact a private attorney of your choice to determine whether your employer has committed a breach of contract.

This opinion is based upon the information provided in your letter of November 27, 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.

Very truly yours,

Jeffrey G. Shapiro
Senior Attorney

JGS:jc
Enclosure
cc: Carmine Ruberto

¹Please note that supervising other workers, having hiring and firing authority and having policy making authority are all aspects of employment in an "executive" capacity, not part of employment in an "administrative" capacity. Therefore, the fact that you do not do these things does not bar your classification as an exempt employee.