



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

February 19, 2009



Re: Request for Opinion
Overtime
RO-08-0052

Dear [REDACTED]:

I have been asked to respond to your letter of April 30, 2008 in which you request this Department's opinion regarding the calculation of overtime for several classes of employees. Please accept my apology for the late response to your request. The questions raised in your letter are addressed individually below.

1. The method for calculating overtime for a tipped employee (e.g. waiter, host, bartender).

Please be advised that the calculation of overtime, allowances, and the minimum wage for a tipped employee varies depending on the industry and position for which such an employee is engaged. (See e.g., 12 NYCRR §§137-1.4; 137-1.5; 138-2.1; 141-1.7; 142-2.5.) The most commonly addressed situations for the calculation of overtime for tipped employees are addressed below.

Food service workers in the restaurant industry are required to be paid a cash wage of at least \$4.60 per hour, provided that the tips of such worker, when added to such cash wage, are equal to or exceed an hourly rate of \$7.15, (Labor Law §652(4); 12 NYCRR §137-1.5). This \$2.55 per hour difference between the regular minimum wage and the minimum cash wage that must be paid to food service workers is commonly known as a "tip allowance." The overtime rate required to be paid to such employees must be at least \$8.175 for all hours worked over 40 in a week. This figure represents one and one half times the minimum wage, less the tip allowance (\$10.725 minus \$2.55).

Service employees in the restaurant industry are required to be paid at a regular rate not less than \$7.15 per hour, and at an overtime rate not less than \$10.725. (12 NYCRR §137-1.4.) An allowance of "\$1.60 an hour for an employee whose average of tips received is between

\$1.60 and \$2.30 per hour; \$2.30 per hour for an employee whose average of tips received is \$2.30 per hour or more” may be applied to the employee’s regular and overtime rates of pay. Such an allowance does not vary depending on whether hours worked by the employee are at the employee’s regular or overtime rate of pay.

Employees not covered by an industry specific minimum wage order are covered by 12 NYCRR 142--Minimum Wage Order for Miscellaneous Industries. These employees must be paid at a regular rate not less than \$7.15 per hour, and at an overtime rate not less than \$10.725. An allowance of “\$1.10 an hour for an employee whose weekly average of tips received is between \$1.10 and \$1.75 per hour, and \$1.75 per hour for an employee whose weekly average of tips received is \$1.75 per hour or more” may be applied to the employee’s regular and overtime rates of pay. (12 NYCRR §142-2.5.) As with service employees in the restaurant industry, such an allowance does not vary depending on whether hours worked by the employee are at the employee’s regular or overtime rate of pay.

2. *The method for calculating the blended rate for overtime for an employee who works two (non-tipped) jobs (such as manual laborer or office worker).*

Please be advised that there is no basis in the New York Labor Law for the term “blended rate for overtime.” Therefore, there is no method for calculating such “blended rate.” Instead, an employee must be paid for all hours worked over forty in a single week for a single employer at one and one half times the regular rate of pay for such work. It has been this Department’s long-standing interpretation of law that although an employee may work two different jobs for the same employer at different rates of pay, all time worked by that employee, either daily or weekly, is considered as part of single workday/workweek, regardless of the job title in which that work is performed. For example, to use the job titles cited by you, if an employee works as a manual laborer for twenty-four hours in one week and also works twenty-four separate hours in the same week for the same employer as an office worker, then that employee will be deemed to have worked for that employer for forty-eight hours in that week. All work performed during the eight hours over forty must be paid at time and one half times the regular rate normally paid to that employee for that work. (12 NYCRR §142-2.2). Accordingly, if the employee in the above example worked six of the eight hours over forty as a laborer and two of the eight as an office worker, then that employee must be paid for that time as follows – six hours at 1.5 times that employee’s regular rate as a laborer plus two hours at 1.5 times that employee’s regular rate as an office worker.

3. *The method for calculating the blended rate of overtime for an employee who works two jobs, one of which is a tipped position (such as a waiter, host, bartender) and the other a non-tipped position.*

See responses to questions 1 and 2 above.

This opinion is based on the information provided in your letter of April 30, 2008. A different opinion might result if the circumstances outlined in your letter changed, 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:da

cc: Carmine Ruberto