



New York State Department of Labor

Andrew M. Cuomo, Governor

Colleen C. Gardner, Commissioner

February 7, 2011



Re: Request for Legal Opinion
Split Shift – Restaurant Industry
File No. RO-10-0173

Dear [REDACTED]:

This letter is written in response to yours of September 3, 2010, in which you ask for a formal legal opinion confirming “that the regulation requiring ‘split shift’ payments does not apply to the restaurant industry, which is governed by its own separate wage order.” By this opinion, the Department of Labor confirms that split shift payments are not required in the restaurant industry, but wishes to clarify the current requirements for spread of hours payments, which are similar to split shift payments in many situations.

First, it is important to note that as of January 1, 2011, there are no longer separate Minimum Wage Orders for the restaurant industry (formerly 12 NYCRR Part 137) and for the hotel industry (formerly 12 NYCRR Part 138). As of that date, these industries are governed by a combined Minimum Wage Order for the Hospitality Industry, 12 NYCRR Part 146, combining and modifying the provisions of former Parts 137 and 138. Please further note that the restaurant industry is subject to Part 146 (*see* 12 NYCRR §146-3.1).

Next, the definitions of “spread of hours” and “split shift” remain consistent through all minimum wage orders. Former regulation 12 NYCRR §137-3.11 and current regulation 12 NYCRR §142-2.18, a provision of the Minimum Wage Order for Miscellaneous Industries, both define “spread of hours” as “the interval between the beginning and end of an employee’s workday. The spread of hours for any day includes working time plus time off for meals plus intervals off duty.” The current definition of “spread of hours” applicable to the hospitality industry, 12 NYCRR §146-1.6, is substantially similar, the only difference being in the first sentence, which now reads “[t]he *spread of hours* is the length of the interval between the beginning and the end of an employee’s workday.” Similarly, former regulation 12 NYCRR §137-10 and current regulation 12 NYCRR §142-2.17 both define a “split shift” as “a schedule of daily hours in which the working hours required or permitted are not consecutive. No meal

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period of one hour or less shall be considered an interruption of consecutive hours.” Once again, the current definition of “split shift” applicable to the hospitality industry, 12 NYCRR §146-3.9 is substantially similar, to wit: “a schedule of daily hours in which the working hours required or permitted are not consecutive. Interruption of working hours for a meal period of one hour or less does not constitute a split shift.”

You have correctly asserted that split shift pay is not required in the restaurant industry. As you state in your letter, 12 NYCRR §142-2.4 states that employees shall receive one hour’s pay at the minimum wage in addition to the required minimum wage for any day in which: a) the spread of hours exceeds ten hours; b) there is a split shift; or, c) both situations occur. You also correctly state that prior provision 12 NYCRR §137-1.7 stated that such additional pay was mandated for restaurant employees only “[o]n each day in which the spread of hours exceeds 10,” with no requirement that such additional pay be provided to employees who have worked a split shift. Current provision 12 NYCRR §146-1.6(a) uses language substantially similar to that of 12 NYCRR §137-1.7.

As you can see from the above-quoted definitions, there is considerable potential for overlap between an employee’s “spread of hours” and his/her work under a “split shift.” The “spread of hours” is the full length of time from the beginning to the end of an employee’s workday, including intervals off duty, while a “split shift” arises only when the employee’s workday consists of non-consecutive hours. 12 NYCRR §146-1.6 sets forth, as an example of a “spread of hours greater than 10,” a situation in which an employee works from 7 am to 10 am, and then from 7 pm to 10 pm in the same day. Such an employee has both worked a spread of hours greater than 10, as his/her workday began at 7 am and ended at 10 pm, and worked a split shift, as his/her working hours were not consecutive. Accordingly, that employee, if employed in the restaurant industry, would be entitled to one hour of spread of hours pay under 12 NYCRR §146-1.6, or would, if working in an industry regulated by 12 NYCRR Part 142, be entitled to one additional hour of pay at the minimum wage under 12 NYCRR §142-2.4(c) as he/she both worked a spread of hours greater than ten and a split shift. If, however, an employee were to work from 7 am to 10 am and then from 1 pm to 5 pm in the same day, that employee, if working in an industry regulated by 12 NYCRR Part 142, would be entitled to one additional hour of pay at the minimum wage under 12 NYCRR §142-2.4(b) as he/she worked a split shift, but, if that employee worked in the restaurant industry, he/she would be entitled to neither spread of hours pay under 12 NYCRR §146-1.6(a) as his/her spread of hours did not exceed ten, nor split shift pay as there is no provision in 12 NYCRR Part 146 for split shift pay.

Finally, please note that although you are correct that there is no requirement that employees in the restaurant industry receive split shift pay, 12 NYCRR §146-2.1(a)(4) states that among the payroll records required to be kept by employers for each employee in the hospitality industry are “the number of hours worked daily and weekly, *including time of arrival and departure for each employee working a split shift* or spread of hours exceeding 10,” (emphasis added). Such records are necessary as 12 NYCRR Part 146 contains various provisions in which the fact that an employee worked a split shift, and the hours worked in such shifts, are relevant (e.g. 12 NYCRR §§146-1.5 and 146-1.9(a)(3), among others).

This opinion is based exclusively on the facts and circumstances described in your letter dated September 3, 2011, 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:

A handwritten signature in black ink, appearing to read "Jeffrey G. Shapiro", written over a horizontal line.

Jeffrey G. Shapiro
Associate Attorney

JGS:da