



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

November 25, 2009



Re: Request for Opinion
Break Time
RO-09-0130

Dear [REDACTED]

This letter is written in response to yours dated September 15, 2009 in which you request an opinion relating to break time under the New York State Labor Law. Your letter states that a hotel containing a full-service restaurant that provides employees with either a thirty-minute or one-hour lunch break¹, utilizes recordkeeping software that automatically deducts the lunch break from the amount of time worked. In cases in which employees work through this break, they fill out a form indicating such so that the employer's payroll records accurately reflect the amount of time worked by the employee. Employees are also given short breaks, less than twenty minutes each, for which the employee is not required to "punch in and out" and are paid by the employer. Based on this factual background, the questions posed in your letter are addressed individually below:

1. *Is the employer's practice of revising its punch records to remove the Lunch Break to accurately reflect time worked lawful under [the] New York Labor Law?*

Section 191 of the Labor Law provides that employees are entitled to the full payment of wages for all hours worked no later than the time period specified by that Section. To fail to pay an employee for all time worked within the time periods specified violates Section 191 of the Labor Law. So long as the practices described result in the payment of wages for all hours worked by the employees in question, the practice described in your letter does not appear to be in violation of the New York State Labor Law.

¹ This letter offers no opinion with regard to the sufficiency of the thirty-minute or one-hour meal periods under Section 162 of the Labor Law since your letter neither inquires nor provides sufficient information to provide a definitive opinion as to such.

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2. *Is the employer entitled to a credit for paid Short Breaks (i.e. time not actually worked by an employee but paid) if the employee claims that he or she is entitled to additional pay during a work week?*

Federal regulation 29 CFR §785.18 provides, in full, as follows:

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (Mitchell v. Greinetz, 235 F. 2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); Ballard v. Consolidated Steel Corp., Ltd., 61 F. Supp. 996 (S.D. Cal. 1945))

That regulation, which it has been this Department's longstanding policy to follow, requires that break time, such as the "Short Breaks" referred to in your question, be counted as hours worked. Section 191 of the Labor Law, as stated above, requires the full and timely payment of wages for all hours worked. Therefore, since any reduction in the amount paid to employees for any "Short Breaks" would result in the nonpayment of wages for hours worked by the employee, an employer is not entitled to a credit for "Short Breaks."

3. *If an employee fails to take a Lunch Break and does not notify the manager that he/she did so in direct violation of the company's policy, is additional straight time compensation due if less than 40 hours were worked assuming the employee still received the minimum wage for the workweek?*

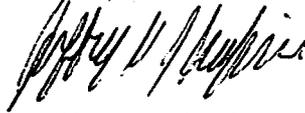
Section 191 of the Labor Law provides that employees are entitled to payment of wages for all hours worked. Nothing in that Section or in any other provision contained in or adopted under the New York State Labor Law relieves an employer of that requirement for an employee's failure to abide by an employer's policies for reporting and/or taking break or lunch time.² Furthermore, deductions from wages for violations of an employer's policies are prohibited by Section 193 of the Labor Law and the regulations contained in the State Minimum Wage Orders. (12 NYCRR §137-2.5; 12 NYCRR §138-3.6.) Therefore, while the Department would not characterize the payment of wages to an employee for all hours worked to be "additional straight time compensation," as it is merely payment for hours worked, an employer's failure to make such payments would be in violation of the New York State Labor Law.

² This letter offers no opinion with regard to the employer's obligation to enforce a lunch break under the New York State Labor Law as that issue was not raised in your letter.

This opinion is based on the information provided in your letter of September 15, 2009. 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.

Very truly yours,

Maria L. Colavito, Counsel

A handwritten signature in black ink, appearing to read "Jeffrey G. Shapiro". The signature is written in a cursive style with some loops and flourishes.

By: Jeffrey G. Shapiro
Associate Attorney

JGS:mp

cc: Carmine Ruberto