



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

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October 23, 2008

Re: Request for Opinion  
Multiple Positions  
RO-08-0123

Dear [REDACTED]:

This letter is written in response to your request for an opinion dated September 26, 2008. Your letter states that your company has a "salaried/exempt" employee who has expressed interest in working a part-time hourly position to supplement their income. The individual is currently employed as an assembly supervisor for one of your subsidiary companies working forty hours per week Monday-Friday. The part time position is a three month assignment, working 6 hours per day Monday-Friday and Saturdays on occasion. Your letter asks whether such a practice is permissible under the New York State Labor Law and, if so, whether the additional hours worked by the employee must be paid at the overtime rate although the employee's primary job is "salaried/exempt." In responding to your request, please be advised that the Department does not dispute or confirm the exempt status of the "salaried/exempt" position you describe since such a determination is not necessary to respond to your request.

An employee's performance of both exempt and non-exempt activities during the same workweek "defeats any exemption that would otherwise apply." (See, Skipper v. Superior Dairies, Inc., 512 F.2d 409 (5th Cir. Fla. 1975); see also, Hodgson v. Wittenburg, 464 F.2d 1219 (5th Cir. 1972); Brennan v. Six Flags Over Georgia Ltd., 474 F.2d 18 (5th Cir. 1973); Wyatt v. Holtville Alfalfa Mills, Inc., 106 F.Supp. 624 (D.Cal. 1952), remanded, 230 F.2d 398 (9th Cir. 1955); Crooker v. Sexton Motors, Inc., 469 F.2d 206 (1st Cir. 1972).) The overtime compensation required by the New York State Labor Law and the Fair Labor Standards Act must be paid for all hours worked regardless of the "exempt" work performed by the employee. Therefore, hiring an exempt employee to perform non-exempt work would negate any exemption that would otherwise apply. In such a case, both the exempt and non-exempt work would have to be treated as non-exempt.

It has been this Department's long-standing interpretation of law that although an employee may work two different jobs for the same employer, for the purposes of calculation of overtime, all hours worked in excess of forty in any week worked for that employer must be paid

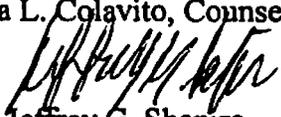
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at overtime rates regardless of the job in which those hours fall. Since no exemption would apply to such work based upon the factors discussed above, the overtime rate to be paid must be calculated as one and one half times the regular rate paid for the work performed during those overtime hours.

This opinion is based on the information provided in your letter of September 26, 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:jc

cc: Carmine Ruberto