



New York State Department of Labor  
David A. Paterson, Governor  
Colleen Gardner, Commissioner

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March 11, 2010

[REDACTED]

Re: Request for Opinion  
Live-In Companions  
RO-09-0169

Dear [REDACTED]:

I have been asked to respond to your letter dated November 23, 2009, in which you ask several questions regarding employees providing "companionship services" within the meaning of the federal Fair Labor Standards Act (FLSA) exemption for such services. Your letter asks four questions for which you request that it be assumed that your client's employees are within the FLSA companionship exemption. Each of your questions is discussed individually below.

1. *Under New York State Law, must my client pay these home health aides overtime? If so, after how many hours of work during a particular week does that obligation obtain, and under which state statute/regulation(s)?*

The New York State Minimum Wage Act, which contains the State minimum wage and overtime provisions, generally applies to all individuals who fall within its definition of "employee." (*see*, Labor Law §651 *et seq.*) Section 651(5) defines "employee" as "any individual employed or permitted to work by an employer in any occupation," but excludes fifteen categories of workers from that definition. (*see*, Labor Law §651(5)(a-o).) Subpart 2.2 of the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR §142-2.2) provides, in relevant part, that all "employees" must be paid at a rate not less than one and one half times their regular rate of pay in accordance with the provisions and exceptions of the FLSA. Subpart 2.2 also provides that employees exempted under Section 13 of the FLSA must nevertheless be paid overtime at a rate not less than one and one half times the minimum wage. In short, "exempt" employees under Section 13 of the FLSA must be paid at a rate of not less than one and one half times the minimum wage for overtime hours worked unless such employees fall outside of the New York Minimum Wage Act's definition of "employee."

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Your letter requests that the Department assume that the employees in question fit within the "companionship services" exemption of the FLSA. Since that exemption is contained in Section 13 of the FLSA (29 USC §213(a)(15)), the employees described in your letter are required to be paid not less than one and one half times the minimum wage rate for all hours worked in excess of forty hours per workweek should such individuals be non-residential employees, and forty-four hours per workweek should they be residential employees.<sup>1</sup> However, it is worth noting that such employees are nevertheless subject to the remaining provisions of the Minimum Wage Orders including, for example, the requirement that employees be paid not less than the minimum wage, for spread of hours pay, call-in pay, and split-shift pay.

It is worth noting that Article 19 of the New York State Labor Law [Minimum Wage Act] excludes "companions" from its definition of "employee," and therefore from the coverage of the Minimum Wage Orders. (Labor Law §651(5)(a).) That provision provides that "someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping" is excluded from the definition of the term "employee." (Id.) In *Settlement Home Care v. Industrial Board of Appeals*, 151 A.D.2d 580, 581 (2d Dep't 1989), the Third Department affirmed a decision of the Industrial Board of Appeals holding that "sleep-in home attendants" did not fall within the exception contained in Section 651(5)(a) and noted that the exemption may not be found applicable unless "all of the statutory requirements have been established." (Id. at 582 [Emphasis added]). The Court set forth three mandatory requirements, which it derived directly from Section 651(5)(a), to determine whether an employee fits within the "companionship exception": (1) the individual must "live in the home of an employer," (2) the individual must be employed "for the purpose of serving as a companion to a sick, convalescing or elderly person," and (3) that the individual's "principle duties do not include housekeeping." (Id. at 582-583.) Since your letter does not request an evaluation of the applicability of that exception, or sufficient facts upon which to make such an evaluation, no opinion is offered as to its applicability at this time.

2. *Would your answer to "1," above, change if the home health care aide's hourly wage exceeded the New York State minimum wage?*

As the answer to the question above states, the employees described in your letter are not exempted from the requirement that the minimum wage be paid as no exception to the applicability of the State Minimum Wage Act has been shown to apply. However, should the employees be paid in excess of one and one half times the minimum wage rate, no premium payment is required for any overtime hours worked.

3. *Would your answer to "1," above, change if the home health aide was a licensed practical nurse?*

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<sup>1</sup> Residential employee is defined by 12 NYCRR §142-2.1 as "one who lives on the premises of the employer." For further discussion of "residential employees," please see the decision of the Second Department in *Settlement Home Care v. Industrial Bd. of Appeals of Dep't of Labor*, 151 A.D.2d 580 (1989).

Please be advised that licensed practical nurses do not fit within the "companionship services" exemption to the FLSA and, as such, such individuals would be subject to the overtime provisions in both the FLSA and the New York State Labor Law. (See, 29 USC §213(a)(15); 29 CFR Part 541; FLSA Fact Sheet No. 25.)

4. *Under New York State law, must my client pay the "spread" set forth at 12 NYCRR Section 142-2.4 when an aide's work exceeds 10 hours?*

Regulation 12 NYCRR §142-2.4(1) states that "[a]n employee shall receive one hour's pay at the minimum hourly wage rate, in addition to the minimum wage required by this part for any day in which: (a) the spread of hours exceeds 10 hours..." The term "spread of hours" is defined by 12 NYCRR §142-1.28 as "the interval between the beginning and end of an employee's workday. The spread of hours includes working time plus time off for meals plus intervals off duty." The "spread of hours" regulation applies to all "employees" defined in 12 NYCRR §142-2.14 regardless of whether such employees fit with a FLSA exemption for overtime pay (except those persons exempted from the definition of "employee" as set forth in Section 651(5) of the Labor Law). It is important to note that the "spread of hours" regulation does not require all employees to be paid for an additional hour, but merely that the total wages paid be equal to or greater than the total due for all hours at the minimum wage and overtime rate, plus one additional hour at the minimum wage for each day in which a "spread" is required to be paid.

As stated above, since nothing in your letter provides a basis to exclude the employees in question from the requirement of the Minimum Wage Orders, it appears that your client is required to pay the "spread" set forth in the Minimum Wage Orders as described above.

5. *Under New York State law, if a home health care aide "lives in," what hours count towards calculating a ten hour day?*

To answer this question, it is necessary to determine the number of hours worked by a live-in employee. To do so, we must distinguish between "on call" and "subject to call" time as employees must be paid for all time spent "on call." "On call" time is that time during which employees are required to remain at the prescribed workroom or workplace, awaiting the need for the immediate performance of their assigned duties. Employees who are "on call" are considered to be working during all the hours that they are confined to the workplace including those hours in which they do not actually perform their duties. "Subject to call" time is that time in which employees are permitted to leave the work room or workplace between work assignments to engage in personal pursuits and activities. In some cases, employees who are "subject to call" may be restricted to a specified area, to be reachable by telephone or otherwise, to report to the work assignments within 15 to 30 minutes, etc. In cases in which an employee is "subject to call," working time starts when they are actually ordered to a specific assignment or at the time in which they perform work for the employer.

Regulation 12 NYCRR §142-2.1 provides that the minimum wage shall be paid to employees for the time an employee is permitted to work or is required to be available to work at

a place prescribed by the employer. However, that regulation provides that "residential employees," those who live on the premises of their employer, are not deemed to be working during normal sleeping hours merely because the employee is "on call" for those hours or at any time the employee is free to leave the place of employment. Since your letter does not state the nature of the premises in which the aides in question are living, a definitive determination as to whether the individuals fall within that definition cannot be made. While this distinction is important for the purposes of determining the number of hours at which overtime is owed (44 for residential employees vs. 40 for non-residential employees), the Department applies the same test for determining the number of hours worked by all live-in employees.

In interpreting these provisions, it is the opinion and policy of this Department that live-in employees must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable.

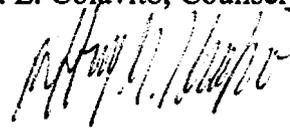
Therefore, a live-in employee is required to be paid "spread of hours" pay for all days in which he or she works as a live-in employee since such employee is deemed to work, at a minimum under the rubric described above, thirteen hours per day.

This opinion is based on the information provided in your letter dated November, 23 2009. A different opinion might result if the circumstances stated therein change, 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:

  
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JGS:mp

cc: Carmine Ruberto

