



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

June 30, 2010

[REDACTED]

Re: Request for Opinion
Overtime
RO-10-0025

Dear [REDACTED]:

This letter is written in response to your letter dated January 29, 2010, in which you request an opinion as to whether certain employees meet the requirements for an overtime exemption pursuant to Section 13(b) of the Federal Fair Labor Standards Act (FLSA). Your letter states that you are the president of a moving and storage company that transports household goods in interstate commerce. You ask whether the "non-exempt employees of [your] company meet the requirements for the overtime exemption under the FLSA."

The FLSA is a federal law enforced by the United States Department of Labor. Therefore, please be advised that it is not appropriate for this Department to provide interpretations of federal law as we have no jurisdiction over the enforcement of such law. If you wish to obtain a formal opinion with regard to the interpretation of the FLSA, you should direct your request to the United States Department of Labor, Wage and Hour Division. You can consult your local phonebook to find the office of the USDOL nearest your home or office or you may go to the USDOL website, www.dol.gov for further information in this regard.

Please note, however, that the FLSA does not prevent the states from enacting wage and overtime laws and regulations that are more beneficial to workers than the FLSA (*see* 29 U.S.C. §218; *Manliguez v. Joseph*, 226 F. Supp.2d 377 (EDNY 2002)). Regulations adopted pursuant to the New York State Minimum Wage Act do contain some overtime requirements that apply to employees who are otherwise exempt under the FLSA. Therefore, only to the extent that it is necessary to determine the applicability of the New York State Minimum Wage Act, it is appropriate for this Department to determine the applicability of an exemption in Section 13(b) of the FLSA. This Department's interpretations of the applicability of such exemptions neither bind, nor are bound by, an interpretation of the United States Department of Labor.

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."

Phone: (518) 457-4380 Fax: (518) 457-1164
W. Averell Harriman State Office Campus, Bldg. 12, Room 508, Albany, NY 12240

(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.”

While your letter does not request an opinion as to the applicability of any particular exception contained in Section 13(b) of the FLSA, of which there are 30, or any of the exceptions from the definition of “employee” for New York State minimum wage and overtime purposes, the facts presented in your letter indicate that the exception contained in Section 13(b)(1) of the FLSA (“any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935 [49 USCS § 31502]”) may be applicable to the employees referred to therein. While your letter does not provide sufficient facts upon which to evaluate such applicability, which would more properly be done by the U.S. Department of Labor in any case, enclosed with this letter please find a guidance document from that Department regarding the requirements for determining the applicability of the exemption in Section 13(b)(1) of the FLSA. While this Department recognizes the exception set forth in Section 13(b)(1) of the FLSA, nothing within the New York Labor Law or the Minimum Wage Orders otherwise excludes such employees from the definition of “employee” contained therein and, therefore, from the overtime requirements described above. Accordingly, even if these employees meet the requirements of the Motor Carrier Exception in Section 13(b)(1) of the FLSA, they must, under the New York Labor Law, be paid not less than one and one half times the minimum wage rate for all overtime hours worked.

This opinion is based exclusively on the facts and circumstances described in your letter dated January 29, 2010, 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: 
Michael Paglialonga
Assistant Attorney I

MLC:MP
cc: Carmine Ruberto
Enclosure: FLSA Fact Sheet No. 19

Fact Sheet #19: The Motor Carrier Exemption under the Fair Labor Standards Act (FLSA)

Section 13(b)(1) of the FLSA provides an overtime exemption for employees who are within the authority of the Secretary of Transportation to establish qualifications and maximum hours of service pursuant to Section 204 of the Motor Carrier Act of 1935, except those employees covered by the small vehicle exception described below.

Thus, the 13(b)(1) overtime exemption applies to employees who are:

1. Employed by a motor carrier or motor private carrier, as defined in 49 U.S.C. Section 13102 (see **Employer** below);
2. Drivers, driver's helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce (see **Employee Duties** below); and
3. Not covered by the small vehicle exception (see **Small Vehicle Exception** below).

1. Employer

- Motor Carriers are persons providing motor vehicle transportation for compensation;
- Motor Private Carriers are persons other than motor carriers transporting property by motor vehicle if the person is the owner, lessee, or bailee of the property being transported, and the property is being transported for sale, lease, rent, or bailment, or to further a commercial enterprise.

2. Employee Duties

- The employee's duties must include the performance, either regularly or from time to time, of safety-affecting activities on a motor vehicle used in transportation on public highways in interstate or foreign commerce. Employees must perform such duties as a driver, driver's helper, loader, or mechanic. Employees performing such duties meet the duties requirement of the exemption regardless of the proportion of "safety affecting activities" performed, except where the continuing duties have no substantial direct effect on "safety of operation," or where such safety affecting activities are so trivial, casual, and insignificant as to be de minimis (so long as there is no change in the duties).
- Transportation involved in the employee's duties must be in interstate commerce (across State or international lines) or connect with an intrastate terminal (rail, air, water, or land) to continue an interstate journey of goods that have not come to rest at a final destination.
- Safety affecting employees who have not made an actual interstate trip may still meet the duties requirement of the exemption if:
 - a) The employer is shown to have an involvement in interstate commerce; and
 - b) The employee could, in the regular course of employment, reasonably have been expected to make an interstate journey or could have worked on the motor vehicle in such a way as to be safety-affecting.
- The Secretary of Transportation will assert jurisdiction over employees for a four-month period beginning with the date they could have been called upon to, or actually did, engage in the carrier's interstate activities. Thus, such employees would satisfy the duties requirement of the Section 13(b)(1) exemption for the same four-month period, notwithstanding references to the contrary in 29 C.F.R. § 782.2.

3. Small Vehicle Exception

Notwithstanding the Section 13(b)(1) exemption, the overtime provisions of Section 7 of the FLSA shall apply to an employee of a motor carrier or motor private carrier in any work week that:

1. The employee's work, in whole or in part, is that of a driver, driver's helper, loader or mechanic affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce, except vehicles:
 - (a) Designed or used to transport more than 8 passengers, including the driver, for compensation; or
 - (b) Designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation; or
 - (c) Used in transporting hazardous material, requiring placarding under regulations prescribed by the Secretary of Transportation;and
2. The employee performs duties on motor vehicles weighing 10,000 pounds or less.

The Section 13(b)(1) exemption does not apply to an employee in such work weeks even though the employee's duties may also affect the safety of operation of motor vehicles weighing greater than 10,000 pounds, or other vehicles listed in subsections (a), (b) and (c) above, in the same work week.

Typical Problems

The Section 13(b)(1) overtime exemption does not apply to employees not engaged in "safety affecting activities", such as dispatchers, office personnel, those who unload vehicles, or those who load but are not responsible for the proper loading of the vehicle. Only drivers, drivers' helpers, loaders who are responsible for proper loading, and mechanics working directly on motor vehicles that are to be used in transportation of passengers or property in interstate commerce can be exempt from the overtime provisions of the FLSA under Section 13(b)(1).

The Section 13(b)(1) overtime exemption does not apply to employees of non-carriers such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, or firms engaged in the leasing and renting of motor vehicles to carriers.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.