



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

December 7, 2010

[REDACTED]

Re: Request for Opinion
Salary Basis
RO-10-0063

Dear [REDACTED],

This letter is written in response to your letter dated April 21, 2010, in which you inquire whether requiring an employee to use paid vacation, personal, or sick time off for partial day absences would affect that employees "exempt" status. Your letter states that salaried employees would be required to use accumulated leave time for partial days of absence and that once they have exhausted their vacation, personal, and sick leave, they would be paid their salary in full. Since your letter does not provide the specific factual basis under which your question arises, it is assumed that you are inquiring whether the practice of requiring salaried employees to utilize paid vacation, personal, and sick leave would violate the "salary" requirement for the State and federal administrative, professional, and executive exemptions/exceptions to the overtime requirements.

The federal Fair Labor Standards Act and the regulations under the State Minimum Wage Act require that most employees be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half times their regular rate of pay for all hours worked over 40 hours in a workweek. However, these requirements are independent of each other and operate to provide both the U.S. Department of Labor and this Department authority over the enforcement of their respective provisions. It is important to note that the FLSA does not prevent 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 from overtime under the FLSA. In order to reach a determination as to whether a job falls under a permitted overtime exemption, the Department may examine both the FLSA and the more stringent provisions of the State Minimum Wage law and orders. Where the criteria in a New York State exception mirror those for an exemption in the FLSA, this Department usually construes the criteria in our regulations in line with those contained in the FLSA, its regulations, and interpretations by the U.S. Department of Labor. However, this Department is not bound by the decisions and interpretations of the U.S. Department of Labor, nor is that Department bound by this or other interpretations issued by this agency.

The New York State Minimum Wage Act 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 subject to the exemptions of the FLSA. Subpart 2.2 also provides that employees exempted under Section 13 of the FLSA must nevertheless be paid overtime but at a rate not less than one and one half times the minimum wage. As alluded to above, this requirement is independent of the overtime requirements contained in the FLSA, which are not incorporated by reference; rather they operate as independent and concurrent requirements for the payment of overtime.

As you appear to be aware, both the FLSA and the State Minimum Wage Act provide exemptions/exceptions from both minimum wage and overtime pay for individuals employed as bona fide executive, administrative, professional, and outside sales employees. To qualify for these exemptions/exceptions, employees generally must meet certain tests regarding their job duties and be paid on a salary basis. While the tests for job duties differ slightly between the FLSA and the State Minimum Wage Act, the State requirement that these employees be paid a salary, notwithstanding any differences in the threshold amount of that salary, is interpreted in line with the regulations explaining the FLSA salary requirement. Those requirements are explained in Federal regulation 29 CFR 541.600 *et seq.* and provide as follows:

An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. (29 CFR 541.602(a))

That regulation provides further that subject to several exceptions, "an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." (29 CFR 541.602(a).)

As relevant to the present inquiry, regulation 29 CFR 651.602(b)(1) provides as follows:

Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

Under these regulations reductions in pay for partial day absences violate the salary basis rule, except those occurring in the first or final week of an exempt employee's employment or for unpaid leave under the Family and Medical Leave Act. However, your letter merely states that the employer will require employees utilize their vacation, personal, or sick time for partial day absences and that employees who have exhausted such time will not be subject to any deductions from their pay for partial days worked. Assuming that the requirement to use vacation, personal, or sick leave time for partial day absences is properly enunciated in the employer's employee benefits policy in accordance with Section 198-c of the Labor Law, such a policy would not violate the salary basis rule since the employees in question would receive their full salary regardless of the number of hours worked.

This opinion is based exclusively on the facts and circumstances described in your email and subsequent communication, 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

cc: Carmine Ruberto