

Good afternoon, my name is Robert McCarthy and I am an attorney representing the Rochester Regional Joint Board, Workers United. The Rochester Regional Joint Board represents the interests of locals throughout the State of New York whose members include hotel and restaurant industry workers. By way of this representation, the Rochester Regional Joint Board has become very familiar with a number of matters that the Commissioner of Labor has asked this Board to address.

As the Commissioner of Labor Patricia Smith stated in her opening statement and charge to this Board on March 31, 2009, “. . . the Wage Orders help to preserve the right of the employee to his or her own tips and to ensure a reliable income to tipped employees, such that their entire household budget is not subject to the unpredictability of patrons’ gratuities.” This point is especially poignant in these uncertain economic times. We are confident that the Board will remain mindful of this point as it proceeds with its review process.

Effects of *Samiento v. World Yacht, Inc.*

One area of concern that we ask that the Board address is the right of employees to claim gratuities in the wake of *Samiento v. World Yacht Inc.*, 10 N.Y.2d 70, 854 N.Y.S.2d 83 (2008).

In Samiento, the Court of Appeals held that mandatory service charges may be considered gratuities, as defined under Section 196-d of the NYS Labor Law, when it is shown that employers represented or allowed their patrons to believe that the charges were in fact gratuities for their employees. The employer in Samiento told inquiring patrons that the service charge was the gratuity or would be paid to the wait staff as “additional compensation.”

In the wake of Samiento, the Union has encountered employers who have instructed patrons not to leave a gratuity because the service charge was going to the employees in the form of higher wages. These employers contend that by claiming the service charge results in “higher wages,” it is not indicating to the patrons that the charge is a gratuity. We maintain that the distinction between informing a patron that a service charge results in higher wages and informing the patron that a service charge will result in “additional compensation” is purely semantical. In both cases, the employer is dissuading the patron from leaving a tip by leaving that patron with the impression that the service charge is being provided to the staff, whether it be directly or through higher wages.

Samiento made clear that employers are not permitted to use a service charge to assume gratuities intended for the employees. We ask that the

Board address this matter and make clear that if the employer imposes a service charge policy that discourages tipping that service charge in its entirety must be considered a gratuity under Section 196-d.

Overtime Exemption For Hotel Banquet Staff

Another area that has caused some confusion is the payment of overtime to hotel banquet workers. Recently, we had a hotel employer notify the union that it intended to classify a banquet wait staff as exempted from overtime pursuant Section 7(i) of the FLSA, which provides:

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

The Hotel's position was bolstered by the Seventh Circuit's decision in Mechmet v. Four Seasons Hotel, 825 F.2d 1173 (7th Cir. 1987). The Court held that banquet staff employed by the hotel were exempt from overtime

pursuant to § 7(i). The Court found that each employee's share of the service charge invariably exceeded their base pay. As a result, the commissions (gratuities) were more than 50% of compensation for the represented period. Under the FLSA, regular rate of pay includes base pay plus gratuities. Thus, the employees' "regular rate of pay" was in excess of one and one-half times the federal minimum wage. The Court found that both tests of § 7(i) were met and that the employee could be considered as exempt.

However, the Department of Labor issued a Letter Opinion on March 9, 2009, stating that even if an employee is exempt under Section 7(i), the worker is still afforded the rights and protections afforded employees under NYS Labor Law. The FLSA does not diminish the rights or protections afforded under the New York State Labor Law, unless otherwise provided therein. Please find attached a copy of a letter from Michael T. Harren to the Department of Labor, dated November 4, 2008, and the Department of Labor's response, dated March 9, 2009.

Nonetheless, the Hotel maintained that even if it was required to provide overtime under state law it was not required to include the service charge percentage provided to staff when calculating regular rate of pay for overtime purposes. In other words, the employer was attempting to have its

cake and eat it too. The employer wanted to include the percentage service charge when calculating the regular rate of pay for Section 7(i) exemption purposes, but not when calculating regular rate of pay when determining overtime under state law.

In the same Opinion Letter, the Department of Labor stated that the banquet service charge should be included in the regular rate of pay when calculating overtime pursuant to 12 NYCRR Section 138-2.2.

We would ask that the Board address this issue by making it clear that if an employer is to include a service charge in its calculation of regular rate of pay for FLSA exemption purposes, it must include it when calculating overtime under state law.

Spread of Hours/ Split Shifts

Lastly, we would like to address the spread of hours provisions. The spread of hour provision for restaurant workers and all year hotel workers provides that employers are to pay employees an additional hour of minimum wage if the employee's schedule exceeds ten hours. The Southern District of New York has issued two interpretations of the spread of hour provisions. In Yang v. ACBL, 04 Civ. No 8987 (S.D.N.Y. December 5, 2005), the Court held that the employer is obligated to pay this hour of additional pay regardless of whether the employee's average hourly wage.

However, in Chan v. Triple 8 Palace Inc., 03 Civ. 6048 (SDNY March 30, 2006), the Court stated that the additional hour pay at minimum wage is not required if the employee's pay is sufficiently high so that the other hours of pay totaled cover the additional hour at minimum wage. In other words, an employee whose schedule exceeds ten hours must receive minimum wage for every hour worked, plus one hour at minimum wage. However, if the employee's daily pay rate exceeds this amount, he or she is not entitled to the additional hour.

The interpretation offered in Triple 8 eliminates the spread hour provision for a large pool of restaurant and hotel workers. The spread of hours provision was intended to discourage employers from creating unnecessarily long days by imposing long breaks between shifts. The additional hour at minimum wage would not make employees rich, nor would it bankrupt employers. However, the provision would impress upon employers the need to consider its employees when scheduling.

Therefore, we ask that the Board adopt the interpretation adopted by the Southern District in Yang, which provides that all employees are entitled to the spread of hour provision regardless of pay.

We thank the Board for its time and consideration of these matters.

November 4, 2008

Via Facsimile: 518/457-1164

Maria L. Colavito, Esq., Counsel
New York State Department of Labor
W. Averill Harriman State Office Campus
Building 12 – Room 509
Albany, NY 12240

Re: Calculation of Overtime for Banquet Wait Staff
Minimum Wage Order for Hotel Industry

Dear Ms. Colavito:

We are counsel for a union representing workers in the hotel industry. Recently, a hotel employer notified the union that it intended to classify banquet wait staff as exempt from overtime pursuant to Section 7(i) of the Fair Labor Standards Act. Assuming that wait staff could be classified as exempt pursuant to FLSA § 7(i), we request an opinion from your office as to whether the overtime requirements set forth in the Minimum Wage Order for the Hotel Industry issued by your department would continue to apply. Additionally, since § 7(i) requires the employee to receive a "regular rate of pay," which is in excess of one and one-half times the federal minimum hourly rate, we request an opinion as to whether such rate would be held to be the employee's "regular rate" for the purposes of the regulations at Section 138-4.16 and would be used for calculating overtime hourly rates pursuant to Section 138-2.2.

The recently negotiated collective bargaining agreement between the employer and our client provides that overtime need not be paid to employees "classified as 7(i) exempt." FLSA § 7(i) exempts from federal overtime requirements commissioned employees:

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of

Maria Colavito, Esq., Counsel
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compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

The employer currently pays overtime to its banquet wait staff for hours worked in excess of 40 hours in a work week.

In Mechmet v. Four Seasons Hotel, 825 F.2d 1173 (7th Cir. 1987), Judge Posner, writing for the Seventh Circuit, held that banquet staff employed by the hotel were exempt from overtime pursuant to § 7(i). In that case, the hotel added an 18% service charge to each banquet bill and distributed 16% of that amount among the staff serving the banquet. The Court found that each employee's share of the service charge invariably exceeded their base pay. As a result, the commissions (gratuities) were more than 50% of compensation for the represented period. The employees' "regular rate of pay" (base plus gratuities) was in excess of one and one-half times the federal minimum wage. The Court found that both tests of § 7(i) were met and that the employee could be considered as exempt.

With respect to our client's members, a typical member of the banquet wait staff receives a basic hourly rate of \$5.30 per hour. For a representative period, her share of the service charge collected by the employer is \$18.00 per hour. It would appear that under the Mechmet decision these employees could be exempt under § 7(i).

We are requesting an opinion as to whether the wait staff at this facility would continue to be subject to the Minimum Wage Order for the Hotel Industry without regard to whether they were treated as exempt under FLSA § 7(i). We believe the employees continue to be covered under New York State rules on the basis that these employees continue to be "food service workers" as defined in Section 138-4.7 and continue to meet the definition of "employees" under Section 138-4.4 (and not exempt pursuant to any of the exemptions set forth in that section).

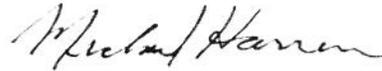
We understand that the employer's current method of compensating for overtime satisfies Part 138. The employer currently pays employees \$8.88 per hour for all hours worked in excess of 40 per week. This overtime rate plus a tip allowance of \$2.55 exceeds time and one-half the New York State minimum wage.

We would ask that you assume that the employer, in order to satisfy the exemption under § 7(i), calculates the employee's regular rate as including the full tip amount received (basic hourly rate of \$5.30 plus average service charge of \$18.00 = \$23.30 regular rate). In such a circumstance, would an employer be obligated to pay, under New York State law, time and one-half the \$23.30 regular rate for all hours worked in excess of 40?

Maria Colavito, Esq., Counsel
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Thank you in advance for your courtesies and consideration in this matter.

Very truly yours,



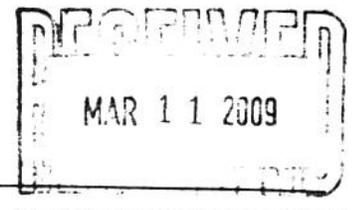
Michael T. Harren

MTH:seg

cc: Mr. Gary Bonadonna
Mr. Michael Roberts



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



March 9, 2009

Michael T. Harren, Esq.
1600 Crossroads Building
Two State Street
Rochester, NY 14614-1397

Re: Request for Opinion
Minimum Wage/Overtime
Hotel Industry
RO-08-0137

Dear Mr. Harren:

I have been asked to respond to your letter of November 4, 2008 in which you state that you are counsel to a labor union representing workers in the hotel industry. Your letter states that, recently, a hotel employer notified your client of its intentions to classify banquet staff as exempt from overtime pursuant to Section 7(i) of the Fair Labor Standards Act (FLSA [29 USC §201 *et seq.*]). The questions posed in your letter regarding such an exemption are addressed individually below.

1. Would the rate of pay prescribed by Section 7(i) of the FLSA be used to determine the employee's "regular rate" under 12 NYCRR §138-4.16, and would that "regular rate" be used for calculating overtime hourly rates pursuant to 12 NYCRR §138-2.2?

Yes. Subpart 4.16 of the Minimum Wage Order for the Hotel Industry defines "regular rate," for purposes of that part, as "the amount that the employee is regularly paid for each hour of work." The determination of an employee's regular rate of pay is made under Subpart 4.16 regardless of whether such rate is used to satisfy provisions contained in the FLSA. An employee's overtime hourly rate would therefore be calculated at one and one half times such regular rate pursuant to Subpart 2.2.

2. Would the wait staff continue to be subject to the Minimum Wage Order for the Hotel Industry without regard to whether they were treated as exempt under Section 7(i) of the FLSA?

Yes. While an employee may be exempted from the minimum wage and overtime protections of the FLSA, the FLSA expressly allows state laws to provide employees with greater protections than those provided by Federal Law. (*see*, 29 USC §218(a).) "FLSA does

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not, however, pre-empt state regulation of wages and overtime if the state's standards are more beneficial to workers," (*Manliguez v. Joseph*, 226 F. Supp.2d 377, 388-389 (EDNY 2002)). Therefore, insofar as the Minimum Wage Order for the Hotel Industry guarantees employees minimum wage and overtime protections exceeding the FLSA, such protections control. Under the New York State Labor Law, an employee's exempt status under the FLSA does not diminish their rights or protections provided by the New York State Labor Law, unless otherwise provided therein. The Minimum Wage Order for the Hotel Industry makes no reference to the FLSA, and that Act's exemptions, are, therefore, not applicable to employees covered by it.

3. Assuming an employer, in order to satisfy the exemption under Section 7(i) of the FLSA, calculates the employee's regular rate as including the full tip amount received (i.e. basic hourly rate of \$5.30 plus an average service charge of \$18.00 equaling a regular rate of \$23.30), would the employer be obligated to pay one and one half times such a regular rate for all hours worked in excess of 40?

As set forth above, 12 NYCRR §138-4.16 defines "regular rate" as "the amount that the employee is regularly paid for each hour of work. Furthermore, Labor Law §190(1) defines the term "wages" as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." As such, it is this Department's opinion that if an employer uses an amount paid to an employee as part of the calculation of the employee's regular rate for federal purposes then that amount paid must be deemed part of the employee's regular rate for New York State purposes. Accordingly, if an employer deems an employee's regular rate of pay to be \$23.30 per hour for purposes of Section 7(i) of the FLSA, then that shall be deemed to be the employee's regular rate for all New York State purposes, including but not limited to the calculation of overtime due to that employee pursuant to 12 NYCRR §138-2.2.

This opinion is based on the information provided in your letter dated November 4, 2008. A different opinion might result if the circumstances outlined in your letter 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: Jeffrey G. Shapiro
Associate Attorney

JGS:da

cc: Carmine Ruberto