



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

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May 29, 2008

(VIA FAX AND MAIL)

Re: Request for Opinion  
Minimum Wage Orders - Regular Rate  
RO-08-0059

Dear [REDACTED]:

This letter is written in response to yours of March 20, 2008, in which you ask whether the cost or value of lodgings or meals supplied to an employer must be included in the calculations of an employee's regular rate of pay. You state that you were told by an investigator from the New York State Department of Labor - Division of Labor Standards that, unlike calculations made under the Fair Labor Standards Act, the cost or value of lodging and meals are not included in the calculation of the regular rate under New York State law. Please be advised that the investigator correctly stated this Department's policy on this issue.

New York State Regulation 12 NYCRR §142-2.16 reads, in full, as follows:

The term regular rate shall mean the amount that the employee is regularly paid for each hour of work. When an employee is paid on a piece-work basis, salary, or any basis other than hourly rate, the regular hourly wage rate shall be determined by dividing the total hours worked during the week into the employee's total earnings.

As you can see, there is nothing in the regulation stating that the cost or value of meals or lodging shall be included in the calculation of an employee's regular rate. The question here is whether such cost or value may be considered as "earnings." It is this Department's long-standing practice that they may not.

The Department's guidelines for investigators, in use since April 1, 1991, state, in relevant part:

In determining an employee's total earnings, all forms of compensation are taken into account including commissions,

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excluded under Section 7(e) of the FLSA. Also excluded when calculating the regular rate are extra payments required by wage order provisions, i.e. uniform maintenance, split shift and spread rates. *The value of meals and lodging provided to employees will also not be considered part of earnings for the purpose of determining the regular rate.* Any tips received by the employee in excess of the tip allowance are not to be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment. (Underlining in original, italics added).

Accordingly, the Labor Standards investigator with whom you spoke correctly described this Department's policy of not including the cost or value of meals and lodging when calculating an employee's regular rate of pay.

This opinion is based upon the information provided in your letter of March 20, 2008. A different opinion might result if any facts provided have been inaccurately stated, or if there are other relevant facts that have not been disclosed. If you have any further questions, please feel free to contact me.

Very truly yours,

Jeffrey G. Shapiro  
Associate Attorney

JGS:jc

cc: Carmine Ruberto

