



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

October 2, 2009

[REDACTED]

Re: Request for Opinion
Overtime Compensation
RO-09-0102

Dear [REDACTED]:

I have been asked to respond to your letter dated July 16, 2009 in which you ask whether you are entitled to overtime pay for hours worked in excess of forty per workweek at a single business upon assignment from two temporary employment agencies. Your letter states that the agencies hired you to do cleaning and that the assignment to the same local hotel was a coincidence.

In general, employees are entitled to overtime pay at a rate not less than one and one half times their regular rate of pay for all hours worked for an employer in excess of forty per workweek. While individuals working for more than one separate employer may not be entitled to overtime pay, an individual may be deemed to be the "employee" of more than one employer where such employers operate as "joint employers."¹ Accordingly, an employee working in excess of forty hours a week for "joint employers," may be entitled to overtime pay for such work even if the employee did not work in excess of forty hours for either one of the joint employers.

The facts from a recent court decision [*Barfield v NYC Health and Hospitals Corp.*] are particularly relevant to the scenario described in your letter. In that case, a nurse that was employed by three different health care agencies was temporarily assigned to the same hospital by each agency. While the nurse did not work more than forty hours per week for any one of the agencies, she worked in excess of forty hours per week for the hospital as assigned by those agencies without receiving overtime pay for those hours.

¹ (See, *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132 (2d Cir 2008); *Rutheford Food Corp. v. McComb*, 331 U.S. 772 (1947); *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003).)

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Her work for the hospital was over a prolonged period of time since the hospital used the agencies during the course of its normal business operations. Based upon those facts and its test for joint employment, the court held that the hospital was a joint employer with the agencies and, as such, the nurse was entitled to overtime pay for all hours worked in excess of forty per workweek.

Unfortunately, while the facts described by you appear to be similar to those in *Barfield* where the court determined that the nurse was entitled to overtime pay, your letter does not set forth sufficient facts upon which this Department may definitively determine whether the hotel and the temporary employment agencies were operating as "joint employers." In order to enable this Department to make such a determination, kindly respond to the following questions to the best of your ability:

- Did the hotel have the power to hire you (e.g. contact you directly or specifically request your services through the agency)?
- Did the hotel have the power to fire you?
- Who set your work schedule, the hotel or the agencies?
- Who set your rate and/or method of pay?
- Did the hotel supervise and/or control your conditions of employment (e.g. break times, meal periods, dress code, etc.)?
- Did the hotel maintain records regarding your work (e.g. number of hours worked, time of arrival and departure, etc.)?
- Did you have to fill out paperwork for the hotel?
- Did you use the hotel or the agency's equipment to perform your work?
- Was your work for the hotel done exclusively at the hotel?
- Does the hotel use temporary agencies only on an as-needed or permanent basis, or does it use them in its normal operations?
- Is there any training needed to perform work at the hotel? If so, who provided that training?
- Apart from merely being related to cleaning, what work did you perform for the hotel?
- Was your work supervised by the employees of the hotel?
- Did you work exclusively for the hotel, or was it merely a temporary or one-time assignment?
- Do either of the employment agencies provide workers predominantly or exclusively for the hotel?
- Was the hotel aware of the fact that you were working for more than one temporary agency?
- Was the hotel aware of the fact that you worked in excess of forty hours per workweek?

Additionally, if there are any other facts which you know about the relationship between the temporary agencies and the hotel, please do not hesitate to include them in your response.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By: 

Jeffrey G. Shapiro
Associate Attorney

JGS:

cc: Carmine Ruberto

