



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

June 29, 2010

[REDACTED]

Re: Request for Opinion
Overtime—Restaurant Managers
RO-09-0157

Dear [REDACTED]:

This letter is written in response to your letter of November 10, 2009 in which you ask for assistance in making a determination as to whether store managers of a restaurant franchise are exempt from the overtime provisions of the New York State Labor Law. Your letter states that you represent a restaurant franchise that employs one store manager in each of its stores. The managers are individually responsible for the operations of each store, reporting only to the franchise owner, for which they are paid a salary in excess of \$543.75 per week. The restaurant managers work approximately 50 hours per week, of which approximately 10-12 hours involve non-managerial work preparing food and beverages for customers when the restaurant is busy. Their duties include the hiring and firing of employees, and directing the work of all of the employees in the restaurant. This salary remains constant regardless of the number of hours they work per workweek. Your letter asks whether, based on the facts provided in your letter, the managers are exempt from overtime requirements of the New York State Labor Law under the "executive exemption" or any other exemption.

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." (*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 1.3 of the Minimum Wage Order for Restaurant Industry (12 NYCRR §137-1.3) 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. Under that regulation, all "employees," regardless of their status under a federal Fair Labor Standards Act (FLSA) exemption are required to be paid overtime at a rate not less than one and one half times their regular rate of pay. Workers

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excluded from the coverage of the State's Restaurant Industry Wage Order may still be required to be paid overtime by virtue of the fact that such exclusion does not remove them from the coverage of the FLSA. Therefore, an analysis of your question requires several determinations to be made: 1) are these individuals "employees" within the meaning of the Restaurant Industry Wage Order; and 2) if not, are these individuals subject to any exemptions under the federal Fair Labor Standards Act?

The definition of "employee" in the Restaurant Industry Wage Order contains an exception for persons employed in a "bona fide executive capacity." (12 NYCRR §137-3.2(c)(1)(i).) This regulation defines such persons, in relevant part, as those

- (a) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;
- (b) who customarily and regularly directs the work of two or more other employees therein;
- (c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;
- (d) who customarily and regularly exercises discretionary powers;
- and
- (e) who is paid for his services a salary of not less than * * * \$543.75 per week * * * inclusive of board, lodging, other allowances, and facilities.

Based upon the description of the job duties of the restaurant managers provided in your letter, it appears that they could meet the requirements of 12 NYCRR §137-3.2(c)(1)(i) for employees working in a bona fide executive capacity.

The first criterion, which requires that the employee's primary duty consist of the management of the enterprise, appears to be satisfied since your letter indicates that the primary duty of the restaurant managers is the management of the individual restaurant. It is worth noting that the restaurant managers described in your letter spend approximately 10-12 hours per week preparing food and beverages. Such time cannot be described as the management of the enterprise, rather it is that more commonly associated with the direct operation of the enterprise. However, since such time only amounts to 20 to 24 percent of the employee's time, it is not likely to be found to prevent the restaurant managers in question from satisfying the first requirement. Therefore, based on the information provided in your letter, the primary duty requirement for the executive exclusion would likely be satisfied.

The second and third criterion also appear to be satisfied since the employees customarily and regularly direct the work of other employees, and has the authority to hire and fire other employees.

The fourth criterion, that the employee customarily and regularly exercises discretionary powers, appears to be satisfied since the employee has managerial control over the enterprise and

only reports to the franchise owner. Furthermore, it appears that the employee has significant other responsibilities which require the exercise of discretionary powers including, for example, analyzing business information looking for trends and identifying root causes and taking accountability for all controllable profit line items on the restaurants profits and losses.

Finally, the fifth criterion appears to be satisfied since your letter states that the restaurant manager is paid a salary in excess of \$543.75 per week.

However, please be aware that job descriptions alone are an insufficient basis upon which to evaluate whether such employees fit within the definition of a "bona fide executive" under either the FLSA or the State Minimum Wage Orders since the actual job duties of individuals may, and often do, differ significantly from such job descriptions. Therefore, a definitive determination as to the applicability of such exemptions/exclusions must be made based upon a case-by-case assessment of an employee's actual job duties following an investigation by the Department.

Finally, as stated above, an employee excepted from the definition of "employee" in the Restaurant Industry Wage Order may still be subject to the provisions of the FLSA, I have enclosed a fact sheet published by the United States Department of Labor to assist you in determining the applicability of the corresponding FLSA exemption to these employees. Since the FLSA is a federal statute enforced by the United States Department of Labor we are unable to provide any guidance as to how it would be applied to these individuals. 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.

This opinion is based exclusively on the facts and circumstances described in your letter dated November 10, 2009, 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. 17B

Fact Sheet #17B: Exemption for Executive Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for administrative, professional, computer and outside sales employees, and for more information on the salary basis requirement.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Management

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity

and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Department or Subdivision

The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

Customarily and Regularly

The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

Two or More

The phrase "two or more other employees" means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Particular Weight

Factors to be considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include, but are not limited to, whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee's recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

Exemption of Business Owners

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.