



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

March 10, 2009



Re: Request for Opinion
Compensable Travel Time
RO-09-0023

Dear [REDACTED]:

This letter is in response to your email of February 13, 2009, in which you ask whether employees who conclude an 8 a.m. – 4 p.m. shift and work an additional overtime shift at a different site beginning at 4:30 p.m. must be compensated for their thirty minute travel between job sites. Your letter references a 1966 U.S. Department of Labor opinion letter which states, based on the factual circumstances presented, that the exclusion from hours worked of the time spent in travel from one plant to another, between a regular and an overtime shift, from hours worked would not be in violation of the Fair Labor Standards Act.

In interpreting the New York State Labor Law, and the regulations adopted thereto, the New York State Department of Labor (“Department”) is not bound by the United States Department of Labor’s interpretations of the Federal Fair Labor Standards Act. The Fair Labor Standards Act expressly permits states to enforce state Labor Laws that benefit or protect employees to a greater degree than do the provisions of the Federal Law. (*see* 29 USC 218(a)) Therefore, the U.S. Department of Labor’s 1966 letter has no relevance to this Department’s interpretation of New York State Law.

Subsection 2.1(b) of the Minimum Wage Order for Miscellaneous Industries (12 NYCRR §142-2.1(b)) states, in part, that:

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling *to the extent that such traveling is part of the duties of the employee.* [Emphasis added]

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In determining whether time spent in traveling is counted as time worked, the time must be considered part of the "duties of the employee." Where an employee is not completely relieved from duty and cannot effectively use the time for his own purposes without restrictions, such time must be considered to be part of the "duties of the employee." Such a situation is of the same kind as an employee being "on-call," as opposed to time in which the employee is "subject to call." In general, when an employee is "subject to call," only the hours actually worked are considered to be working time, while all "on call" time is considered working time.

"Subject to call" time is that time during which employee are free to leave and engage in personal pursuits and activities. In such situations, working time starts when they are actually ordered to a specific assignment. "On call" time is time during which the employee is not free to leave or engage in personal pursuits, and is awaiting the need for the immediate performance of their assigned duties. Therefore, a period during which an employee is completely relieved from duties for long enough to enable him/her to use the time effectively for his/her own purposes is not considered time worked. (see 29 CFR §785.6.)

In the present situation, the employees travel time between work sites must be considered time worked since the employees in question are required to travel between job sites in the time period between the shifts and are, therefore, not free to leave or engage in personal pursuits and activities. Since the situation you describe involves a thirty minute window in which the employees must travel from one job site to the other, the entire thirty minute period must be considered time worked.

The travel time between shifts described above should be distinguished between travel time at the beginning and end of the workday, since such time does not have to be counted as time worked since the employee is free engage in personal pursuits and activities.

This opinion is based on the information provided in your email of February 13, 2009. 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