



Electronic Dispatch

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THE NEW YORK STATE DEPARTMENT OF LABOR ISSUES TWO RECENT OPINION LETTERS INTERPRETING THE “SPREAD OF HOURS” REQUIREMENT

Under regulations promulgated by the New York State Department of Labor (“NYSDOL”), employers are required to pay non-exempt employees “one hour’s pay at the basic minimum hourly wage rate, in addition to the minimum wage required, for any day in which (a) the spread of hours exceeds 10 hours; or (b) there is a split shift; or (c) both situations occur.” Under those regulations, the phrase “spread of hours” is defined as “the interval between the beginning and end of an employee’s workday” and includes “working time plus time off for meals plus intervals off duty.”

Recently, there have been conflicting interpretations of this regulation in Federal Court decisions, prompting the NYSDOL to issue two opinion letters reiterating its interpretation of the regulation. This information memo summarizes those conflicting judicial interpretations, and explains the NYSDOL’s current position regarding enforcement of the “spread of hours” requirement.

The NYSDOL’s Enforcement Position Prior To The Conflicting Judicial Interpretations

In 2003, the NYSDOL issued an opinion letter interpreting the “spread of hours” regulation. In that opinion letter, the NYSDOL stated that compliance with the “spread of hours” provision is determined by computing the total minimum wages due to a non-exempt employee for the workweek and comparing those wages with the wages actually received by the employee for that workweek. If the total wages actually received by the employee are equal to or greater than the minimum wages due (including payment for one additional hour at the minimum wage for each day in which the spread of hours exceeds 10), the employer is deemed to be in compliance with the regulation.

For example, suppose an employee works two 12-hour days and two 8-hour days during a workweek at an hourly rate of \$10.00 per hour. The employee’s total wages for the workweek would be \$400.00 (40 hours at \$10.00 per hour). The total minimum wages due to the employee would be \$283.50 (40 hours at \$6.75 per hour plus payment for two additional hours at the \$6.75 minimum wage for the two days in which the spread of hours exceeded 10). Because the total wages paid to the employee exceed the total minimum wages due, the employer would be in compliance with the spread of hours requirement and no additional payment would be due.

The Yang v. ABCL Corp. Decision

In December 2005, in Yang v. ABCL Corp., the United States District Court for the Southern District of New York rejected the NYSDOL’s interpretation of the “spread of hours” regulation. The Court held that a non-exempt employee is entitled to payment for one hour at the minimum wage for each day in which the employee works more than 10 hours in a day, regardless of the employee’s regular rate of pay. The Court stated that “[t]he effect of adopting the agency’s interpretation would be to carve out an exception to the spread-of-hours provision for workers who are properly paid overtime and make more than a minimum wage.”

Under the interpretation set forth in the Yang decision, the employee in the above example would be owed an additional \$13.50 (\$6.75 per hour for the two days in which the spread of hours exceeded 10) over and above the employee’s total wages of \$400.00. Thus, the employee’s total wages for the workweek would be \$413.50.

The Chan v. Triple 8 Palace, Inc. Decision

In March 2006, in Chan v. Triple 8 Palace, Inc., a different judge from the United States District Court for the Southern District of New York rejected his colleague’s Yang decision and adopted the NYSDOL’s interpretation of the “spread of hours” regulation. In



Chan, the Court stated that the NYSDOL's interpretation of the regulation "makes sense" because "[t]he plain text of [the regulation] ensures an additional wage only 'in addition to the *minimum* wage' required under New York law. It is therefore to be expected that the provision will not affect workers whose total weekly compensation is already sufficiently above the minimum rate."

Accordingly, there are two conflicting judicial opinions from the same Federal Court regarding the proper interpretation of the "spread of hours" regulation. The most recent opinion defers to the NYSDOL's interpretation.

The NYSDOL's Current Enforcement Position

Our office recently contacted all eight of the NYSDOL's district offices to inquire whether the NYSDOL continues to follow the interpretation of the "spread of hours" requirement set forth in its 2003 opinion letter (which was adopted in the Chan decision), or whether it has changed its enforcement position in light of the Yang decision. The investigators in each office uniformly informed us that the NYSDOL continues to adhere to its interpretation set forth in its 2003 opinion letter.

In fact, the NYSDOL has issued two recent opinion letters reiterating its interpretation of the "spread of hours" requirement. In one opinion letter, the NYSDOL stated: "It is important to note that the 'spread of hours' regulation does not require all employees to be paid for an additional hour, but merely that the total wages paid be equal to or greater than the total due for all hours at the minimum wage plus one additional hour at the minimum wage." In both opinion letters, the NYSDOL acknowledged the conflicting interpretations set forth in the Yang and Chan decisions, but stated: "As two judges of the same Court disagree on the proper interpretation of [the spread of hours requirement], and as the most recent decision from that Court agrees with this Department's interpretation, the Department of Labor will continue its present interpretation unless and until further guidance comes from the U.S. District Court, Southern District of New York or a higher court."

Accordingly, the NYSDOL's current enforcement position is that an employer does not have to pay additional compensation under the "spread of hours" requirement if the weekly wages actually paid to an employee equal or exceed the total of: (1) 40 hours paid at the minimum wage rate; (2) overtime paid at one and one-half times the employee's regular pay rate; plus (3) one hour of pay at the minimum wage rate for each day in which the employee worked more than 10 hours. Although the Yang decision has called this enforcement position into question, employers should continue to comply with the NYSDOL's interpretation. Employers who do so face an extremely minimal risk of liability for violation of the "spread of hours" regulation.

If you have any questions regarding the "spread of hours" requirement or need any assistance with any wage and hour issues, please contact:

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