

MEMORANDUM

TO: All Clients Doing Business In New York State

FROM: Clifford Ingber

SUBJECT: Additional Hour of Pay May Be Due To Employees On Shifts
in Excess of Ten Hours

DATE: December 23, 2011

Recently, there has been a significant increase in cases brought by employees (and their attorneys) claiming unpaid wages for hours worked as well as overtime premium pay for hours worked in excess of 40 during a work week. Many of these cases are being brought as class action suits which seek to cover all employees who have worked for a particular employer at any time over a six year period.

Another claim for wages in New York which has yet to receive similar attention is the requirement that for employees receiving the minimum wage or close to the minimum wage (or perhaps all employees as noted below), an employer must pay its employees an extra hour of pay at the minimum wage when the "spread of hours" exceeds 10 hours in a day. The spread of hours calculation is based on the start and end time of the employee's shift. For example, if an employee begins work at 8am and finishes at 8pm the "spread of hours" is 11 hours, even if the employee received a one hour unpaid lunch period.

To determine whether the employee is earning sufficiently more than the minimum wage so as not to be due an extra hour at the minimum wage, the employer can perform a daily or weekly calculation. For example, the employee who worked 11 hours in one day with one unpaid hour for lunch, must receive at least \$87 in that day (11 hours x \$7.25 minimum wage + \$7.25). Such a person must have been paid \$7.91 per hour.

To calculate whether the employee is due the extra hour on a weekly basis multiply the base hourly wage by 40, add the amount paid for all overtime hours worked and add \$7.25 (minimum wage) for each day where the spread of hours exceeded 10 hours. For example, an employee who worked 11 hours Mon, Tuesday, Wednesday and Thursday and 8 hours on Friday, with an hour of unpaid lunch each day must be paid at least \$449.32 for the week ([40 hours x \$7.25] + [12 hours o/t x \$10.86] + [4 days x \$7.25]). If this employee's base wage is \$8 per hour, he would

have made \$464 for the week ($[40 \text{ hrs} \times \$8] + [12 \text{ hrs o/t} \times \$12]$). However, an employee earning \$7.50 per hour who worked the same hours as above would be entitled to the additional hour of minimum wage for at least two of the days ($[40 \text{ hrs} \times \$7.50] + [12 \text{ hours o/t} \times \$11.25]$) = \$435 or \$14.32 less than the required \$449.32. Obviously, this rule only comes into play for employees at or very near the minimum wage.

There is one potentially significant wrinkle. The above method of calculation is based on a New York State Department of Labor opinion letter which was cited in 2006 by a federal court judge sitting in the Southern District of New York. However, another judge sitting in the same court found that *anytime* an employee has a spread of hours in excess of 10 in any one day, the employer must pay one additional hour at the minimum wage, *regardless of the employee's wage rate. Moreover, this broader interpretation has recently been adopted by the New York State Department of Labor.* This difference of opinion between two judges in the same federal district remains outstanding.

Please let us know if you have any questions.

Clifford J. Ingber