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July 3, 2008

PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

VIA E-MAIL

Hon. Earle Reed
Town Supervisor
Town of New Hartford
48 Genesee Street
New Hartford, New York 14413

Re: Carol Fairbrother

Dear Earle:

It was a pleasure meeting with you and Ms. Carol Fairbrother recently to determine whether or not she is an exempt or non-exempt employee for purposes of overtime under the Fair Labor Standards Act ("FLSA") and the New York State Labor Law ("NYSL"). After meeting with both of you and reviewing applicable materials and documentation and conducting the necessary legal research, it is my opinion that Ms. Fairbrother is a non-exempt employee of the Town and is entitled to overtime pay.

General Exempt Status Requirements

The determination of whether or not an employee is exempt for purposes of overtime is dictated by three primary inquiries: (1) whether or not the employee was paid on a salary basis; (2) whether or not the employee was paid the proper amount of salary; and (3) whether or not the employee's job duties fall into one of the exemptions. In this particular case Ms. Fairbrother clearly meets the first two requirements, but her job duties fail to clearly fall into one of the primary exemptions. In this case the three primary exemptions are: (1) executive; (2) professional; or (3) administrative.

Executive Exemption

Under the FLSA an employee employed in a bona fide executive capacity means: (1) the primary duty of the employee must be the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (2) the employee

customarily and regularly directs the work of two or more other employees; and (3) the employee has the authority to hire and fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight. The NYSLL adds another requirement, to wit, that the employee must "customarily and regularly exercise discretionary powers."

Ms. Fairbrother does not clearly fall into this exemption for several reasons: (1) she does not regularly direct the work of two or more employees; (2) she does not have authority to hire, fire, etc.; (3) her input has been given little weight over the years as to hiring, firing, etc.; and (4) she performs rather "standard" day-to-day activities and does not appear to customarily and regularly exercise discretionary power.

Professional Exemption

Under the FLSA an employee employed in a bona fide professional capacity means any employee: (1) whose primary duty is the performance of work requiring knowledge of an advanced field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (2) whose primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Under the NYSLL an employee in a bona fide professional capacity means a person: (1) whose primary duty consists of the performance of work: requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; or original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; (2) whose work requires the consistent exercise of discretion and judgment in its performance; or (3) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

Further, there is a federal regulation which states that: "accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals."

Ms. Fairbrother does not clearly fall into this exemption for several reasons: (1) she has no advanced degree; (2) she does not provided work in a specialized area; and (3) her work was, and still is, rather routine in nature.

Administrative Exemption

Under the FLSA an employee employed in a bona fide administrative capacity means any employee: (1) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (2) whose primary duty includes the exercise of discretion and independent judgment.

Under the NYSLL a bona fide administrative employee means an employee (1) whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general operations of such individual's employer; (2) who customarily and regularly exercises discretion and independent judgment; and (3) who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (e.g., employment as an administrative assistant); or who performs, under only general supervision, work along specialized or technical lines requiring special training, experience or knowledge.

This is the closest possibility, but it is clear from the interview that Ms. Fairbrother does not regularly exercise discretion and independent judgment. All overtime exemptions must be proved by the employer and all exemptions shall be narrowly construed against the employer. Therefore, I do not believe that this exemption can be justified.

What Overtime Is Due?

A more difficult question is what overtime is due to Ms. Fairbrother? Under federal law an employee can go back two or three years and recoup overtime, along with interest, and under state law an employee can attempt to recoup six years of back wages with interest. Having spot checked some of Ms. Fairbrother's time sheets it appears that she has made some errors in her calculation. Some of these errors were in her favor and some were in the employer's favor. I recommend that the Town of New Hartford attempt to work out a settlement with her in exchange for a release of all overtime claims under federal and state law. To this end, I suggest you notify Ms. Fairbrother in writing of her entitlement and request that she calculate any and all overtime monies she believes are due and owing her to date keeping in mind the discussion we had with her about weekly hours 35-40. If you would like, I can prepare such a letter for your signature.

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COUNSELORS AT LAW

Please call if you have any questions.

Very truly yours,

HANCOCK & ESTABROOK, LLP

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