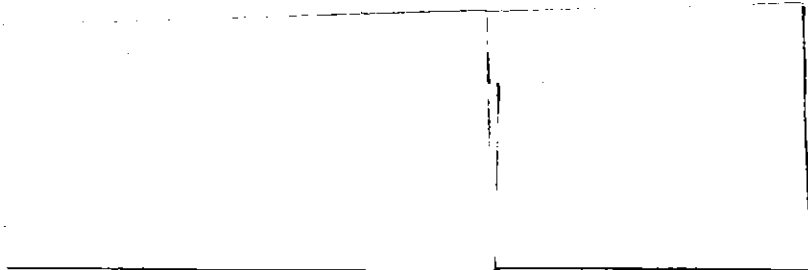




Commonwealth of Puerto Rico  
**DEPARTMENT OF LABOR AND HUMAN RESOURCES**

October 13, 1998



Re: Inquiry No. 14566

This is in reply to your inquiry pertaining to the most recent amendments to Act No. 1 of December 1, 1989, Act to Regulate the Operations of Business Establishments. On behalf of a client of your law firm, you are requesting an opinion with regard to the following:

Our client is in the retail industry, thus the Closing Law regulates its schedule of operations. The Closing Law, as amended on December 31, 1997, provides for the hours that retail and combined retail/wholesale establishments may remain open. That is, all working days from Monday to Saturday, from 5:00 a.m. to 12:00 p.m., and on Sundays from 11:00 a.m. to 5:00 p.m. Accordingly, business establishments shall remain closed and no type of work may be done in them outside of these hours. Nonetheless, as an exception, the Closing Law allows employers to perform such work as is related to the continuity of their operations and the maintenance of their establishment while remaining closed to the public.

It is regarding these hours that questions arise as to how they should be paid. Our client employs a number of employees whose shift begins at 10:00 p.m. and ends at 7:00 a.m. They work an eight hour shift with a one hour meal period. These "overnight" employees work exclusively in tasks related to the continuity of the store's operations and the maintenance of the establishment while the store remains closed to the public. They restock merchandise, order and arrange merchandise and do clean up.

Currently, our client is paying these employees the following way:

- From 10:00 p.m. - 1:00 a.m. they are being paid at the regular hourly rate.
- From 1:00 a.m. - 5:00 a.m. they are paid at double the rate of pay.

From 5:00 a.m. - 7:00 p.m. at their regular hourly rate.

It is our position that the overnight employees are to be paid at the regular hourly rate if the total number of hours do [sic] not surpass eight hours in a twenty-four hour period, regardless of the fact that the establishment is closed to the public. Therefore, and contrary to our client's current practice, these employees should be paid for their eight hours of work at once their regular rate of pay.

As decided by the Supreme Court of Puerto Rico in the case of Srio. del Trabajo v. Grand Union de P.R., 93 D.P.R. 720 (1966), any work done after the retail store is closed to the public related to the maintenance and the continuity of the operations is to be paid at single the rate [sic] unless the employee works in excess of eight hours a day. It is important to note that at the time this case was decided, the Closing Law in force allowed maintenance tasks and work related to the continuity of the retail store's operations only one hour before and one hour after the store opened to the public. In that case, the controversy before the court was whether that hour was to be paid at single the rate [sic], or on the contrary, if the overtime provisions of Law No. 379 required that it be paid double. The Supreme Court reasoned that Law No. 379's requirement that the hours that an employee works for his employer during the days and hours when the establishment in which he renders services should remain closed to the public be paid at double the rate, refers to hours worked in violation of the Closing Law. Thus, since that law allows certain tasks to be performed after closing of the store, these are not to be considered hours requiring extraordinary compensation. See *also*, Ruy N. Delgado Zayas, Apuntes para el Estudio de la Legislación Protectora del Trabajo, p. 62 (1989). Therefore, in order for the time worked by overnight employees to be considered overtime, it must so qualify under the other categories of Puerto Rico's Wages & Hours [sic] law. [footnote omitted]

Accordingly, it is our position that overnight employees need only be paid at once their regular rate of pay as long as the total hours worked during any rolling 24 hour period do not exceed eight hours, or the total hours worked in the established work week do not exceed forty hours. Of course, this does not apply to hours worked on an employee's seventh consecutive day of work, since the law's overtime provisions require those hours be paid at double the regular rate.

As you are aware, Act No. 1, *supra*, was most recently amended by Act No. 212 of December 31, 1997. Prior to said amendment, the last paragraph of Section 4(c) provided as follows:

Business establishments shall remain closed and no type of work may be done in them outside of the hours established in subsections (a), (b) and (c) of this section, except that one hour before being opened to the public and one hour after being closed to the public they may perform such work that is related to the continuity of their operations and the maintenance of the establishment.

The above cited subsections (a), (b) and (c) authorized business establishments to remain open to the public, respectively, from 5:00 a.m. to 12:00 noon on certain half-day holidays; 5:00 a.m. to 9:00 p.m. on January 5 and December 24 and 31; and from 5:00 a.m. to 12:00 midnight on all working days from Monday through Saturday. These limitations were eliminated with the enactment of Act No. 212, *supra*, which repealed subsection (b) and redesignated the former subsection (c) as the new subsection (b), whose last paragraph now reads as follows:

Business establishments shall remain closed and no type of work may be done in them outside of the hours established in subsections (a) and (b) of this section, except that at the discretion of the owner, agent, manager or person in charge of the business, they may perform such work that is related to the continuity of their operations and the maintenance of the establishment. [our translation]

Act No. 212, *supra*, went into effect 90 days after its enactment, i.e., April 1, 1998. As a result of the above amendment, hours worked outside of the hours established in subsections (a) and (b) on work that is related to the continuity of operations and the maintenance of the establishment are no longer classified as overtime hours pursuant to Section 4 of Act No. 379 of May 15, 1948, as amended. Accordingly, since April 1, 1998, such hours may be paid at straight time rates, unless such hours are also in excess of the daily 8-hour standard or the weekly 40-hour standard; or if a higher benefit is required under the terms of a collective bargaining agreement or an individual employment contract.

Your letter does not state whether your client had obtained from the Secretary of Labor and Human Resources the permit required by Act No. 80 of May 5, 1931, as amended. Specifically, Section 4(c) of Act No. 379, *supra*, provides that the term "overtime hours" will include:

The hours that an employee works for his employer during the days or hours when the establishment in which he renders services should remain closed to the public by legal provision; Provided, however, that the hours worked by an employee for his employer during the days or hours in which the establishment must remain closed to the public shall not be considered extra hours, when the employer has obtained from the Secretary of Labor the permit required by Act No. 80 of May 5, 1931, as heretofore or hereafter

amended, and the total number of hours worked by the employee during said day do not exceed eight hours, nor the total number of hours worked during the week exceed forty hours.

In the absence of the above permit, of course, all hours worked by your client's employees between 12:00 midnight and 5:00 a.m. prior to April 1, 1998 would be overtime hours.

The Department's official interpretation of Act No. 1 is summed up in Opinion No. 90-4, issued by the Secretary of Labor on June 11, 1990. The relevant part of said opinion states the following:

Work performed during the hours and days [in which the establishment must remain] closed, as well as [work] performed during the permitted hours on Sunday, is overtime and subject to payment at double time, whenever it involves nonexempt employees, that is, those who are not executives, administrators or professionals, as those terms are defined in Regulation No. 13 of the Puerto Rico Minimum Wage Board. [emphasis supplied] [our translation]

The aforementioned opinion of course predates Act No. 212, *supra*, but is fully applicable to your client's operations prior to April 1, 1998. In other words, it was the legislative intent to require payment at double time for hours worked during the hours and days in which the establishment had to remain closed. By way of exception, Act No. 1, *supra*, authorized the performance of work related to the continuity of operations and the maintenance of the establishment only "one hour before being opened to the public and one hour after being closed to the public", i.e., one hour before 5:00 a.m. and one hour after 12:00 midnight. The purpose of this provision was to enable employers to carry out the stated tasks with their regular employees for a period of one hour before opening to the public and one hour after closing without incurring an overtime liability. It was not intended to create a blanket exemption from the overtime provisions of Act No. 379, *supra*, for "overnight" employees who work a full 8 hours during the hours when the establishment must remain closed to the public. An opinion to that effect was issued by this office on October 29, 1997 in response to Inquiry No. 14402, dealing with employees who worked a regular shift that began at 12:00 midnight and ended at 9:00 a.m. The relevant part of that opinion states the following:

It is pertinent to point out that although the above-cited Section 4(c) of Act No. 1 allows work to be performed, without being considered as overtime hours, one hour before opening to the public and one hour after closing, this provision is inapplicable to the situation that prompted your inquiry. In this case, we are dealing with a regular shift that begins at 12:00 midnight, and

not the continuation of a shift that ends with the closing to the public at midnight. For the same reason, the one-hour exception prior to opening to the public is also inapplicable. [our translation]

In the specific case of your client, you indicate that the "overnight" employees work from 10:00 p.m. to 7:00 a.m., with a one-hour meal period. You further state that these employees are paid four (4) hours at double time rates, i.e., the hours from 1:00 a.m. to 5:00 a.m. In fact, prior to April 1, 1998 all hours worked after the midnight closing hour should have been paid as overtime, for a total of six (6) overtime hours per shift.

In summary, we concur with your interpretation that Act No. 379, *supra*, does not require your client to pay overtime to employees on the night shift, but only since April 1, 1998.

Prior to that date, however, the information provided seems to indicate that your client compensated these employees at straight time rates for hours that were required to be paid at double time under the prevailing wage and hour law, thus incurring with all probability in a retroactive liability for the unpaid overtime.

We trust this information will prove helpful to you.

Cordially,



Edwin A. Hernández Rodríguez  
Acting Solicitor of Labor