



COMMONWEALTH OF PUERTO RICO  
DEPARTMENT OF LABOR AND HUMAN RESOURCES  
Solicitor of Labor

Lcdo. Víctor Rivera Hernández  
Secretary

April 24, 2003

Re: 15070

Dear mister Castillo:

We refer to your letter addressed to María M. Crespo González, former Solicitor of Labor, asking several questions regarding payment of overtime under Law No. 379 of May 15, 1948. Your letter reads as follows:

*"We represent a company ("Employer") that operates a retail store in Puerto Rico subject to the "Commercial Establishment" provisions of 29 L.P.R.A. §301-312. Due to a review of its utilization of personnel, several questions have arisen, as to which we hereby request your assistance, regarding possible overtime payment obligations under Law No. 379 of May 15, 1948 ("Law 379"), as amended, 29 L.P.R.A. §§271-288. Employer is covered by the federal Fair Labor Standards Act ("FLSA") (i.e., it is engaged in interstate commerce with an annual gross volume of sales or business of at least \$500,000), and is not exempted as an employer from its provisions. Employer desires to be in full compliance with all applicable laws.*

*We believe, as discussed below, that the appropriate overtime policies to be implemented by Employer under certain circumstances are not made clear either by the text of Law 379 itself or by the Puerto Rico Supreme Court's decision of June 30, 1998 in the case of Vega vs. Yiyi Motors, 146 D.P.R.*

373 (1998). As you know, in that case, among other things, the Supreme Court explained that in enacting Law 379, as amended, it was the intent of the Puerto Rico Legislature that the FLSA should have full effect in Puerto Rico, including all of its exemptions, with the exception of requiring Puerto Rico employers covered by the FLSA to pay their employees time-and-a-half for any hours worked in excess of eight on any given day. See also *Ortiz Reyes v. Eastern Sugar Assoc.*, 85 D.P.R. 95 (1962); *Olazagasti v. Eastern Sugar Assoc.*, 79 D.P.R. 93 (1956).

Employer's full-time and part-time employees are non-unionized in-store sales personnel who sell goods to the public at the store. They are paid once a week. Sometimes these employees work on Sundays, when the store is open to the public. They are paid an hourly-rate wage plus certain commissions on the goods they sell to the public. More than half of these employees' compensation for a representative period (not less than one month) represents commissions on goods sold. Employer guarantees these commissioned sales employees minimum pay in excess of 1-1/2 times the federal minimum wage.

We understand that pursuant to Article 5 of Law 379, Employer, as one covered by and not exempted from the FLSA, must pay for time worked in excess of the legal eight-hour working day at a rate of not less than time-and-a-half the rate agreed for regular hours, unless a decree issued by the Minimum Wage Board or a collective bargaining agreement that under *YiYi Motors*, this time-and-a-half rate applies both to hours worked in excess of eight hours per day and to hours worked in excess of 40 hours per week.

However, in *Yiyi Motors* the Supreme Court also determined that employees covered, but excluded from the provisions of the FLSA by virtue of the exclusions contained in the federal statute itself, are not entitled to be paid above the regular hourly rate for hours worked in excess of 40 hours per week. It is our understanding that Employer's commissioned retail sales employees are such excluded employees and are not covered by the FLSA's weekly overtime payment requirement pursuant to Section 7(i) of the FLSA, 29 U.S.C. §207(i).

Based on these background facts and circumstances, we request your responses to these questions for our client's guidance:

1. Is Employer obligated to pay overtime above the regular hourly rate for the following hours that are defined as "extra hours" under Article 4 of Law 379, 29 L.P.R.A. §273:

- a. *The hours that an employee works during the days or hours when Employer's store should remain closed to the public by legal provision.*
  - b. *The hours that an employee works during his/her day of rest.*
  - c. *The hours that an employee works on a Sunday.*
2. *If Employer is obligated to pay for the extra hours mentioned in questions 1(a), 1(b), and/or 1(c) above, is Employer required to pay for these hours at double the regular rate, or at one-and-a-half times the regular rate?*
3. *Is Employer obligated to pay overtime above the regular hourly rate for hours worked during the period fixed for meal breaks under Article 14 of Law 379, 29 L.P.R.A. §283, and, if yes, at double the regular rate, or at one-and-a-half times the regular rate?*
4. *Hypothetical example questions.*
  - A. *FULL-TIME STRAIGHT HOURLY. If in a particular workweek a full-time employee who is paid an hourly rate of \$8.00 per hour works 8 hours each day from Monday through Friday and then works 3 hours on Sunday, for a total of 43 hours worked during the week, is Employer required to pay the three hours worked on Sunday at the employee's (a) regular rate; (b) one-and-a-half times the regular rate; or (c) double the regular rate?*
  - B. *PART-TIME PAID HOURLY RATE. If a part-time employee (one who works 22 hours or less per week) during a particular workweek works for 10 hours on a Saturday and 8 hours on a Sunday, for a total of 18 hours worked during the week, at which rate must each of these 18 hours be paid?*
  - C. *PART-TIME PAID HOURLY RATE PLUS COMMISSIONS. In the case of a part-time employee who is paid a base hourly rate plus commissions, are the amounts earned as commissions to be taken into account when calculating the base hourly rate for purposes of paying overtime hours? If your answer to this question is yes, and commissions are to be included, how would such calculation be made?*
  - D. *PART-TIME PAID HOURLY RATE PLUS COMMISSIONS. If a part-time employee who is paid \$6.00 per hour plus commissions works during a particular workweek for only 10 hours on a*

- a. *The hours that an employee works during the days or hours when Employer's store should remain closed to the public by legal provision.*
  - b. *The hours that an employee works during his/her day of rest.*
  - c. *The hours that an employee works on a Sunday.*
2. *If Employer is obligated to pay for the extra hours mentioned in questions 1(a), 1(b), and/or 1(c) above, is Employer required to pay for these hours at double the regular rate, or at one-and-a-half times the regular rate?*
3. *Is Employer obligated to pay overtime above the regular hourly rate for hours worked during the period fixed for meal breaks under Article 14 of Law 379, 29 L.P.R.A. §283, and, if yes, at double the regular rate, or at one-and-a-half times the regular rate?*
4. *Hypothetical example questions.*
  - A. *FULL-TIME STRAIGHT HOURLY. If in a particular workweek a full-time employee who is paid an hourly rate of \$8.00 per hour works 8 hours each day from Monday through Friday and then works 3 hours on Sunday, for a total of 43 hours worked during the week, is Employer required to pay the three hours worked on Sunday at the employee's (a) regular rate; (b) one-and-a-half times the regular rate; or (c) double the regular rate?*
  - B. *PART-TIME PAID HOURLY RATE. If a part-time employee (one who works 22 hours or less per week) during a particular workweek works for 10 hours on a Saturday and 8 hours on a Sunday, for a total of 18 hours worked during the week, at which rate must each of these 18 hours be paid?*
  - C. *PART-TIME PAID HOURLY RATE PLUS COMMISSIONS. In the case of a part-time employee who is paid a base hourly rate plus commissions, are the amounts earned as commissions to be taken into account when calculating the base hourly rate for purposes of paying overtime hours? If your answer to this question is yes, and commissions are to be included, how would such calculation be made?*
  - D. *PART-TIME PAID HOURLY RATE PLUS COMMISSIONS. If a part-time employee who is paid \$6.00 per hour plus commissions works during a particular workweek for only 10 hours on a*

*Thursday and for 10 hours on a Friday, for a total of 20 hours worked during the week, and earns a total of \$200.00 in commissions for that week, at what rate should the 2 extra hours for Thursday and 2 extra hours for Friday be paid, and how do you arrive at such a figure?*

- E. PART-TIME PAID HOURLY RATE PLUS COMMISSIONS. If a part-time employee who is paid \$6.00 per hour plus commissions only works during a particular workweek for 6 hours on a Sunday, earning a total of \$200.00 in commissions for that day, at what rate should the hours worked on such day be paid and how do you arrive at such a figure?*
- F. STORE MANAGER PAID 60% COMMISSIONS AND 40% BASE EXEMPTED UNDER 7(i). If a full-time store manager's compensation consists of 60% commissions and 40% base pay and the manager is an excluded employee not covered by the FLSA's weekly overtime payment requirement pursuant to Section 7(i) of the FLSA, 29 U.S.C. §207(i), is Employer required under Law 379 to pay the extra hours worked, and if yes, at the manager's: (a) regular hourly rate; (b) one-and-a-half times the regular hourly rate; or (c) double the regular hourly rate?*
- G. ASSISTANT STORE MANAGER PAID 60% COMMISSIONS AND 40% BASE EXEMPTED UNDER 7(i). If a full-time assistant store manager is paid 60% Commissions and 40% base pay and is therefore an excluded employee not covered by the FLSA's weekly overtime payment requirement pursuant to Section 7(i) of the FLSA, is Employer required under Law 379 to pay the extra hours worked, and if yes, at the assistant manager's: (a) regular hourly rate; (b) one-and-a-half times the regular hourly rate; or (c) double the regular hourly rate?*
- H. ASSISTANT STORE MANAGER PAID \$210.00 COMMISSIONS AND \$140.00 BASE EXEMPTED UNDER 7(i). If a full-time assistant store manager not covered by the FLSA's weekly overtime payment requirement pursuant to Section 7(i) of the FLSA who earns day from Monday through Thursday and then works 11 hours on Friday, for a total of 43 hours worked during the week, how much is the Employer required to pay the assistant*

*store manager under Law 379 for the three extra hours worked on Friday? How do you arrive at such a figure?*

- I. *STORE MANAGER PAID STRAIGHT SALARY. If a full-time store manager is paid a straight salary of \$700.00 per week, is the Employer required to pay him or her for any "extra hours" worked, and if yes, at the manager's: (a) regular hourly rate; (b) one-and-a-half times the regular hourly rate; or (c) double the regular hourly rate?"*

The following is our position regarding your inquiries.

1. "Is Employer obligated to pay overtime above the regular hourly rate for the following hours that are defined as "extra hours" under Article 4 of Law 379, 29 L.P.R.A. §273

- a. The hours that an employee works during the days or hours when Employer's store should remain closed to the public by legal provision.
- b. The hours that an employee works during his/her day of rest.
- c. The hours that an employee works on a Sunday."

Yes, the employer is required to pay overtime the hours that the employee works during the days or hours when the establishment should remain closed to the public by legal provision and the hours that the employees work on Sundays. Please, refer to Article 12 of Act No. 1 of December 1, 1989, Puerto Rico Closing Law and Article 4 of Act Number 379 of May 15, 1948, as amended, which states as follows:

"Extra working hours are:

- (a) ...
- (b) ...
- (c) 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 and Human Resources the permit required by §§ 289 and 290 of this title, and the total number of hours worked by the employee during said day do not exceed eight (8) hours, nor the total number of number of hours worked during the week exceed forty (40) hours.

- (d) The hours that an employee works for his employer during the day of rest heretofore or hereafter fixed by law in the case of businesses and industries not subject to the closing of their establishments; and the hours that an employee works for his employer on Sundays in those business establishments that continue to operate during that day and are subject to the provisions of Act Number 1 of December 1, 1989; Provided, that the hours worked on Sundays in the business establishments covered by said act shall be paid at a rate equivalent to twice the rate agreed upon for regular hours.
- (e) ...
- (f) ...”

Please, also refer to Act No. 289 of April 9, 1946, as amended, which states that all employees of any commercial establishment shall be entitled to one day of rest for every six working days. The employer who employs or permits an employee to work on the day of rest established by this law shall pay said hours at double the rate agreed upon regular hours.

Act No. 379 excludes from its application the executive, administrative and professional employees as defined by Regulation Number 13 of the Minimum Wage Board, also are excluded the “traveling agents” and “peddlers”.

2. “If Employer is obligated to pay for the extra hours mentioned in questions 1(a), 1(b), and/or 1(c) above, is Employer required to pay for these hours at double the regular rate, or at one-and-a-half times the regular rate?”

As mentioned before, Act No. 289 and No. 379 state that the employer is obligated to pay the hours mentioned in the previous question at double the regular rate. Please, also refer to, Article 6 of Act No. 379 which provides that “every employer who employs or permits an employee to work during extra hours, shall be bound to pay him for each extra hour a wage rate equal to double the rate agreed upon for regular hours;...”

3. Is Employer obligated to pay overtime above the regular hourly rate for hours worked during the period fixed for meal breaks under Article 14 of Law 379, 29 L.P.R.A. §283, and, if yes, at double the regular rate, or at one-and-a-half times the regular rate?

Article 15 of Act No. 379, in its pertinent part, provides as follows:

“ ...

Every employer who employs or permits an employee to work during the period fixed for taking food, shall be bound to pay for said period or fraction thereof at a wage rate equal to double the rate agreed upon for regular hours. In such cases where, pursuant to the provisions of this section, the period fixed for taking food is reduced to a period of less than one hour, the employer shall be bound to pay a wage rate equal to double the rate agreed upon for regular hours, only if he employees or permits an employee to work during such reduced period fixed taking food.

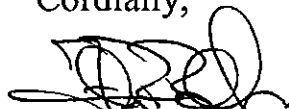
...”

The Puerto Rico Supreme Court has stated that a worker is entitled to double compensation for working during the meal time, irrespective of the employer's duty to pay overtime for any hour worked in excess of the eight-hour day. Concreto Mixto Inc. v. Superior Court, 92 P.R.R. 788 (1965); Pamblanco v. Union Carbide, 90 P.R.R. 693 (1964).

Regarding your “Hypothetical Example Questions”, our Office has an abstention policy and does not answer questions based on hypothetical situations.

We trust the foregoing provides you with the requested information. Should you need further information, please contact us at your convenience.

Cordially,



Félix R. Bello Acevedo  
Acting Solicitor of Labor