



August 19, 2005

FLSA2005-21

Dear **Name\***,

This is in response to your letter requesting an opinion concerning the applicability of the administrative exemption under Section 13(a)(1) of the Fair Labor Standards Act (FLSA) to background investigators (Investigators) employed by your client (Company).

Please note that revisions to the regulations implementing Section 13(a)(1) of the FLSA, 29 CFR Part 541, were published as a final rule in the Federal Register on April 23, 2004 (69 FR 22122), and became effective on August 23, 2004 (copy enclosed). Because the criteria in the duties test for the administrative exemption in the 2004 revised final regulations are substantially the same as under the prior rule, the outcome of this opinion would be essentially identical under either version of the regulations. See, Robinson-Smith v. Government Employees Ins. Co., 323 F. Supp.2d 12 (D.D.C. 2004); McLaughlin v. Nationwide Mutual Insurance Co., 2004 WL 1857112 (D. Or. 2004). Regulatory references in this response cite to the revised final regulations effective August 23, 2004, unless otherwise noted.

You state that the Company has contracted with the Defense Security Service ("DSS"), an agency of the United States Department of Defense, to provide DSS with background investigations of potential government employees being considered for U.S. Government Secret and Top Secret security clearances. These investigations are of critical importance to the Department of Defense's operations. On its internet site, DSS describes itself as providing "a crucial role in safeguarding our Nation's security" by, among other responsibilities, conducting personnel security investigations. Its Personnel Security Investigations Program is described as one of its three primary missions in support of the Department of Defense.

The Investigators' duties involve providing information critical for DSS to determine an individual's eligibility for access to classified information and/or assignment to, or retention in, positions with sensitive duties. In making this assessment, Investigators are to interview the subject of the investigation and witnesses who may have relevant information. Public and criminal records are checked. When interviewing subjects and/or witnesses, the Company's investigators carry DSS credentials and identify themselves as contract investigators conducting personnel security investigations on behalf of DSS. If an Investigator discovers that the subject of the investigation may be involved in any activity that is criminal in nature, may pose a threat to other persons or to the safety of a government installation, is of counterintelligence interest or is otherwise involved in activity that threatens national security, the Investigator must communicate this information to DSS within 24 hours.

At any given time, an Investigator may have up to ten outstanding investigations assigned to him/her that require completion by a deadline set forth in the Contract. It is the Investigator's responsibility to schedule and prioritize his or her pursuit of investigative leads. The Investigator is not limited by the assignment and has discretion to investigate other leads. To accomplish this, the Investigator must assess the leads assigned for the case, following additional or alternative leads where appropriate. The Company only advises that the Investigator strike a balance between contacting a sufficient number of sources in order to get a complete picture of a subject's life and committing investigative over-kill. Striking that balance is left to the Investigator. The Contract states that investigations often involve details of the individual's life and must be conducted with tact and discretion. To that end, the Investigators must possess a high level of professional judgment in pursuing investigative leads.

Investigators are also required to obtain record information regarding citizenship, education, employment, unemployment, criminal convictions, medical history, financial history, foreign travel and foreign connections. The manner by which the Investigator elicits the information is left to the discretion and experience of the Investigator. In particular, the Company has emphasized in written guidance to its Investigators that each Investigator has his or her own style, and they should proceed with whatever works best, as long as the methodology used is in compliance with ethical standards.



If any discrepancies or inconsistencies develop during the course of the investigation, the Investigators must resolve the information in accordance with broad DSS guidelines. These guidelines offer only the minimum efforts that an Investigator must pursue. Additional investigation is permitted at the Investigator's discretion to resolve any issues that still exist. As an example, the subject of an investigation may provide the Investigator with information about his activities that appear questionable or inconsistent with documents that the Investigator has already reviewed. If so, the Investigator is empowered to interview other individuals or check records to develop further information. If the Investigator determines that an individual is not credible, the Investigator will so state in his/her Report of Investigation (ROI).

At the conclusion of the investigation process, the Investigator assembles all investigative leads into a complete ROI. These reports are then used by DSS to determine whether to grant or deny the subject of the background investigation access to classified information.

Thus, to summarize, the Investigators gather factual information according to DSS guidelines and prepare a report about candidates for sensitive Department of Defense positions that will allow others in DSS to determine whether to employ individuals in positions requiring access to classified national security information. The DSS makes all the decisions whether subjects will be granted a security clearance, based in part on the Investigators' reports. You mentioned that mistakes in the DSS decision as to whether an individual should have access to classified information or is a threat to national security can have disastrous consequences, suggesting the critical importance of the accuracy of the Investigators' work to the DSS.

The DSS contract requires that the Company's Investigators possess the following qualifications: (1) successful completion of a four-year course of study leading to a bachelor's degree (presumably in any field); or (2) three years of general experience and successful completion of a Personnel Security Investigations (PSI) Investigator training course approved by DSS (four-week training program consisting of classroom instruction and field training on background investigations for the government); or (3) two years of specialized experience within the last five years and successful completion of the PSI Investigator training course approved by DSS; or (4) one year of specialized federal background investigation experience within the last five years. Investigators must also have at least a Department of Defense Secret clearance or an interim Top Secret clearance to perform work on the DSS contract.

In supplementing your opinion request, you provided a ruling by the Office of Personnel Management (OPM) that found that GS-12 Investigators employed by the Defense Security Service, Department of Defense, qualified for the administrative exemption under OPM rules. The limited analysis in that ruling appears to reach conclusions at variance with judicial rulings applied under the FLSA in the non-federal sector. Because that matter involved a different regulation containing different criteria that do not apply to the present opinion request, we do not find it relevant to the analysis required in responding to your current inquiry.

Below is a discussion of the administrative exemption under the FLSA, which is then followed by an analysis of whether the Investigators qualify for exemption.

Section 13(a)(1) of the FLSA provides a minimum wage and overtime pay exemption for "any employee employed in a bona fide executive, administrative, or professional capacity," as those terms are defined in the regulations 29 C.F.R. Part 541. An employee may qualify for exemption as a bona fide administrative employee if all of the pertinent tests relating to duty, salary level and salary basis, as set forth in section 541.200 of the revised final regulations, are met. A determination of the exempt or nonexempt status of an employee must be made on an individual basis that takes into account all of the pertinent facts relating to the actual work performed by the employee in question. "A job title alone is insufficient to establish the exempt status of an employee." 29 C.F.R. § 541.2. An employer claiming that an employee is exempt from the FLSA under Section 13(a)(1) bears the burden of proving that all of the requirements for exemption are met in a particular case.



Under 29 C.F.R. § 541.200 of the revised final regulations, the term “employee employed in a bona fide administrative capacity” is defined as “any employee: (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week ...; (2) 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 (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.” For discussion purposes, we assume that the Investigators meet the salary or fee basis requirement under subpart G of the revised final rule.

“The phrase ‘directly related to the management or general business operations’ refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” 29 C.F.R. §541.201(a).

“Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.” 29 C.F.R. § 541.201(b).

“An employee may qualify for the administrative exemption if the employee’s primary duty is the performance of work directly related to the management or general business operations of the employer’s customers. Thus, for example, employees acting as advisers or consultants to their employer’s clients or customers (as tax experts or financial consultants, for example) may be exempt.” 29 C.F.R. § 541.201(c).

“To qualify for the administrative exemption, an employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term ‘matters of significance’ refers to the level of importance or consequence of the work performed.” 29C.F.R. § 541.202(a).

“The phrase ‘discretion and independent judgment’ must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee’s assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.” 29 C.F.R. § 541.202(b).

“The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.” 29C.F.R. § 541.202(e). “An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.” 29 C.F.R. § 541.202(f).



As you noted in your letter, the Wage and Hour Division issued an Opinion Letter on September 12, 1997 (WL 971811) that concluded that background investigators conducting investigations of subjects for employment did not qualify for the administrative exemption. That letter also cites several Opinion Letters, which found that police officers who had “primary responsibility for all aspects of the investigation of major crimes” are production workers of the agency and therefore cannot qualify for the administrative exemption (February 1, 1988, WH-529). See also Opinion Letters of December 6, 1988 (state criminal investigators); June 9, 1988, WHM:99:5208 (assistant sheriff, D.A. investigator); and July 8, 1988, FLSA-1167 (state criminal investigators). Other Opinion Letters have also determined that investigators, inspectors, probation officers, and similar employees do not meet the requirements for the administrative exemption because their primary duties were not related to management policies or general business operations of their employers. (See Wage and Hour Opinion Letters of April 17, 1998, WL 852783 (investigators); January 23, 1998, WL 852752 (medical investigators); March 11, 1998, WL 852755 (inspectors); December 21, 1994, WL 1004897 (probation officers); July 26, 1988, WHM:99:5212 (parole agents); and May 19, 1988, WHM:99:5207 (deputy sheriffs, sergeants.)

In applying these general principles, the courts frequently have noted that applying the administrative exemption’s duties test is not as simple as drawing the line between “white collar” and “blue collar” workers. Rather, non-manufacturing employees can be considered “production” employees if their job is to generate (i.e., “produce”) the product or service that the employer’s business offers to the public. See e.g., Reich v. New York, 3 F.3d 581, 587-89 (2d Cir. 1993), cert. denied, 510 U.S. 1163 (1994) (police investigators conduct or “produce” criminal investigations); Dalheim v. KDFW-TV, 918 F.2d 1220, 1230-31 (5<sup>th</sup> Cir. 1990) (television station’s producers, directors, and assignment editors “produced” newscasts and were therefore non-exempt); Reich v. John Alden Life Ins. Co., 126 F.3d 1, 9 (1<sup>st</sup> Cir. 1997) (marketing representatives were not involved in design or generation of insurance policies and therefore could not be considered production employees). As the court noted in Dalheim, 918 F.2d at 1230: “The distinction § 541.205(a) [of the prior rule] draws is between those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market.” The preamble to the final rule similarly recognizes that the production versus staff dichotomy continues to be a useful analytical tool in evaluating whether an employee’s primary duty is work directly related to management or general business operations. 69 FR 22141.

We believe that the activities performed by Investigators employed by your client are more related to providing the ongoing, day-to-day investigative services, rather than performing administrative functions directly related to managing your client’s business. From the information provided in your letter, it appears that the primary duty of the Investigator is diligent and accurate fact-finding, according to DSS guidelines, the results of which are turned over to DSS who then makes a decision as to whether to grant or deny security clearances. Such activities, while important, do not directly relate to the management or general business operations of the employer within the meaning of the regulations.

Moreover, even if this work were viewed as related to the customer’s (DSS) management or general business operations, we believe that most of the work of the Investigators typically involves the use of skills in applying known standards or established techniques, procedures or specific standards, as distinguished from work requiring the exercise of discretion and independent judgment as required for exemption under 29 C.F.R. § 541.202. Even though, as you state, the Investigators are “evaluating alternative courses of conduct and acting upon that evaluation without immediate supervision,” in our view, the Investigators are merely applying their knowledge in following prescribed procedures or determining which procedure to follow, or determining whether standards are met. This is true even though they may have some leeway in reaching a conclusion or performing their work.

In this regard, planning one’s own workload, such as prioritizing the pursuit of particular leads, assessing whether the leads provided are in the Investigator’s area of responsibility, or have provided information that requires further investigation, determining which potential witnesses to see and which documents to review, and making similar decisions that promote effective and efficient use of that individual’s own work



time in performing assigned investigative activities, do not constitute exercising discretion and independent judgment with respect to matters of significance. It is not sufficient that an employee makes decisions regarding “when and where to do different tasks, as well as the manner in which to perform them.” Clark v. J.M. Benson Co., 789 F.2d 282, 287 (4<sup>th</sup> Cir. 1986). Rather, the regulations emphasize both the nature and the level of importance of an employee’s work in relation to managing the employer’s (or customer’s) business operations, and not simply the ultimate consequence of the work when mistakes are made. (See 29 C.F.R. § 541.202(f).) Thus, the regulations provide that personnel clerks who screen applicants to obtain information about “their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption.” 29 C.F.R. § 541.203(e). In contrast, a human resources manager who formulates employment policies, sets the minimum standards and makes the ultimate hiring decisions generally meets the duties requirements. Id.

From the information you have provided, we do not believe that the duties and responsibilities of the Company’s Investigators meet the factors required for exemption indicated above. The revised final FLSA regulations under 29 C.F.R. § 541.203(j) regard public sector inspectors, investigators and similar employees, as employees whose duties have been found not to meet the requirements for the administrative exemption “because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.”

Based upon a review of the information you have provided, it is our opinion that the Company’s Investigators do not qualify as bona fide administrative employees under Section 13(a)(1) of the FLSA. Hence, the Company’s Investigators are covered by the minimum wage and overtime provisions of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259. See 29 C.F.R. §§ 790.17(d), 790.19; Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498, 507 (8<sup>th</sup> Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.  
Deputy Administrator

Enclosure

*\* Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*