



October 13, 2005

FLSA2005-38

Dear *Name**,

This is in response to your letter requesting clarification on the application of the professional exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA) to instructors in a beauty school.

You state that your employer, a nonprofit college, oversees a beauty school. The instructors of the school do not have college degrees or teaching certifications. Nevertheless, you feel that these individuals are exempt because they engage in teaching and instruction and their work is artistic and creative in nature.

The FLSA requires that all covered and nonexempt employees be paid not less than the minimum wage, \$5.15 an hour, for all hours worked and overtime pay for all hours worked over 40 in a workweek. Section 13(a)(1) of the FLSA, 29 U.S.C. §213(a)(1), provides a complete 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 regulations 29 C.F.R. Part 541 (copy enclosed).

Section 541.303(a) defines the term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the FLSA to include "any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed." As we state in Fact Sheet #17D pertaining to this exemption (copy enclosed), the primary duty of teaching "includes, by its very nature, exercising discretion and judgment." Exempt teachers include teachers of skilled and semi-skilled trades, in addition to regular academic teachers and others. 29 C.F.R. 541.303(b).

Section 541.700(a) defines the term "primary duty" to mean "the principal, main, major or most important duty that the employee performs." Section 541.700(b) further states: "[t]he amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement."

As discussed in section 541.204(b), the term "educational establishment" means "an elementary or secondary school system, an institution of higher education or other educational institution." Factors relevant in determining whether post-secondary career programs such as the beauty school are educational institutions include "whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools." *Id.* Your letter provides no evidence that the beauty school is so licensed or accredited or other evidence that the beauty school is an "educational institution" as discussed in section 541.204(b). Determining whether the beauty school is an "educational establishment" within the meaning of section 541.303(a) is the threshold question that must be answered before we can determine whether the instructors at the beauty school qualify as teachers, as defined above.

Absent evidence that both requirements have been met, we must conclude that they are not exempt from the minimum wage and overtime requirements of the FLSA.

You also ask whether the instructors qualify for the exemption for creative professionals whose primary duty is the "performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual mechanical or physical work." 29 C.F.R. 541.302. There is no evidence in your letter that the employees in question have such primary duty, or that beauty instruction is a widely recognized field of artistic or creative



endeavor. Therefore, we conclude that the beauty school instructors do not qualify for the creative professional exemption.

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 a 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 (8th Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures: 29 C.F.R. Part 541
Fact Sheet #17D

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