



August 29, 2005

FLSA2005-30

Dear **Name\***,

This is in response to your request for an opinion concerning whether a "Regional Advocate" can be considered an exempt administrative employee under section 13(a)(1) of the Fair Labor Standards Act (FLSA). The Department last year revised the regulations at 29 CFR Part 541 that define exempt executive, administrative or professional employees and published its final rule on April 23, 2004 in the Federal Register (69 FR 22122). For discussion purposes, we assume that a Regional Advocate meets the salary tests under the final Part 541 FLSA regulations, which became effective August 23, 2004. The Regional Advocate is responsible for advocating for services for people with disabilities. The Regional Advocate represents the wishes and desires of a client and must do so in accordance with national protection and advocacy standards. The Regional Advocate's duties include keeping informed of changes in federal/state laws, regulations, policies, and court orders affecting persons with disabilities. The Regional Advocate maintains full and accurate documentation of all clients assigned, and prepares and provides regular monthly reports of assigned cases to the Data Report Specialist and other management personnel. The Regional Advocate is also responsible for investigating and acting upon complaints of abuse or neglect, directly advises the Lead Advocate on matters relating to the client's concerns, and participates in client case reviews. Furthermore, the Regional Advocate is responsible for representing the employer in outside forums, committees, and work groups as assigned by the Program Director. The Regional Advocate does not supervise other employees.

Below is a discussion of the administrative exemption under the revised final rule, which is then followed by an analysis of whether the Regional Advocate qualifies for the exemption.

As discussed in 29 C.F.R. 541.200(a), the term "employee employed in a bona fide administrative capacity" means "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."

"The phrase 'directly related to 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." 29 C.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).

As explained in the preamble to the final rule, "[f]ederal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case analysis is required." 69 FR 22122, 22143 (April 23, 2004). The administrative exemption thus has requirements pertaining to both the "type of work performed" and "the level of importance or consequence of the work performed." See 69 FR at 22139. With regard to the type of work performed, the preamble explains that the "exemption is intended to be limited...to employees whose work involves servicing the business itself" and thus inapplicable to employees whose work relates to the "production" operations of the business. 69 FR at 22141. Although the production versus staff dichotomy is illustrative, rather than dispositive, it is a useful tool in appropriate cases to identify employees who are excluded from the administrative exemption.

After reviewing the information you provided, we believe that the activities performed by the Regional Advocate are more related to providing the ongoing, day-to-day case management services, which involve duties required in servicing case loads, such as maintaining full and accurate documentation of all clients assigned; preparing and providing monthly reports of assigned cases to the Data Report Specialist and other management personnel; investigating and acting upon complaints of abuse or neglect; advising the Lead Advocate on matters relating to the client's concerns; and participating in client case reviews, rather than performing administrative functions directly related to managing the employer's business or managing the employer's customer's business. Thus, the Regional Advocate is not primarily tasked with performing any of the management or general business operational areas described in 29 C.F.R. 541.201(b); nor is the Regional Advocate primarily tasked with providing administrative services to the employer's customers as contemplated in 29 C.F.R. 541.201(c). Based on this analysis, we conclude that a Regional Advocate's job function does not satisfy the requirement that the primary duty must be 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. See Opinion Letter dated March 5, 1999 (finding that employees in the positions of intake coordinator, program coordinator and assisted living coordinator for individuals with disabilities are engaged in production work and, therefore, do not qualify for the administrative exemption); Opinion Letter dated March 30, 1999 (finding social workers/counselors of a social service agency do not qualify for the administrative exemption).

Therefore, it is our opinion that a Regional Advocate does not meet the criteria to qualify as an exempt administrative employee under the FLSA regulations, implementing the section 13(a)(1) minimum wage and overtime pay exemptions, which took effect on August 23, 2004. Hence, the Regional Advocate is 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 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 (8<sup>th</sup> Cir. 1990).

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.  
Deputy Administrator

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