



October 25, 2005

FLSA2005-45

Dear *Name**,

This is in response to your letter requesting an opinion concerning whether Staffing Managers employed by your client, Company X, qualify for the executive or administrative exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA). You seek this opinion in light of the final rules at 29 C.F.R. Part 541 implementing minimum wage and overtime pay exemption that went into effect on August 23, 2004.

Section 13(a)(1) of the FLSA 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 29 C.F.R. Part 541. An employee may qualify for exemption if all of the pertinent tests relating to duty, salary level and salary basis, as discussed in the appropriate section of the regulations, are met. Please note that revisions to 29 C.F.R. Part 541 were published as a final rule in the *Federal Register* on April 23, 2004 (69 Fed. Reg. 22122) and became effective on August 23, 2004 (copy enclosed).

You state that Company X is a temporary staffing agency. It provides temporary labor in various clerical, accounting, human resource, computer and similar white collar functions to clients who have a need for such personnel. The primary duty of a Staffing Manager is to manage this function. In doing so, a Staffing Manager confers with the client to evaluate what kind of skills are needed: for example, will a certified public accountant be necessary, or will someone with basic accounting and bookkeeping skills fulfill the services required. Once a job description is decided, the Staffing Manager negotiates the terms for the placement and the fee for Company X. Thereafter, the Staffing Manager recruits, interviews and hires the employee to provide the services. In recruiting and selecting employees to fill assignments, Staffing Managers do not simply check off a few minimal requirements, but must evaluate the potential worker's education, skills acquired in prior employment, personality fit and ability to work within a particular organization. Staffing Managers then make recommendations to the client companies for placement of employees at particular assignments. The Staffing Managers' recommendations are typically followed. Staffing Managers also negotiate the wage to be paid by Company X to the employee. Once the employee is placed, the Staffing Manager continues to supervise the services of the employee with the client. The Staffing Manager stays in contact with the client and the employee to evaluate the employee's performance. As the situation calls for, the Staffing Manager decides whether counseling or disciplining an employee is necessary. If the employee fails to respond to counseling or discipline, the Staffing Manager may decide to transfer the employee to another placement, or if necessary, terminate his or her employment with Company X. Staffing Managers typically supervise about thirty employees. Staffing Managers have full authority to discipline, fire, promote and assign to various tasks the employees they supervise. Although the employees of Company X report to a supervisor at the client location for the details of their work, they report to the Staffing Manager for matters relating to length of assignment; position held; performance issues; complaint and grievance issues; counseling; discipline; pay adjustments and termination of employment. In carrying these duties, Staffing Managers work under very little supervision; they make decisions and accomplish their tasks without prior approval and with broad range of discretion.

In addition, Staffing Managers decide if advertising for the position is needed to find certain candidates. They determine where to place the advertisement and negotiate the costs of such placement. Staffing Managers are paid at least \$455 per week on a salary basis.

As discussed in 29 C.F.R. § 541.200(a), the term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the FLSA means "any employee":

- 1) Compensated on a salary or fee basis of at least \$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.

Id. "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 the preamble to the final rule explained, 69 Fed. Reg. 22122, 22143 (April 23, 2004) (copy enclosed), federal courts generally find that employees who meet at least two or three of these factors mentioned above are exercising discretion and independent judgment, although a case-by-case analysis is required.



In performing the Staffing Managers' primary duty of recruiting, hiring and managing the temporary labor pool of Company X's clients, the Staffing Managers perform work in the functional areas of personnel management, human resources and labor relations. See 29 C.F.R. § 541.201(b). Thus, it appears that the Staffing Managers' primary duty meets the requirement that such office or non-manual work be directly related to the management or general business operations of the employer's clients.

Whether a Staffing Manager exercises discretion and independent judgment within the meaning of the regulations would depend, to a great extent, on the amount of selectivity exercised in matching persons seeking employment with the requirements of the job opening and in deciding which employee to send to any particular employer for consideration, as opposed to referring to the employer several prospects who generally meet the qualifications for the job. See WH Opinion Letters dated August 11, 1970 and October 14, 1983 (copies enclosed). It appears that Staffing Managers who recruit; interview; hire and recommend placement of employees to particular assignments; manage the client's temporary labor pool; provide advice on personnel issues; handle complaints; resolve grievances; and terminate employees on behalf of the client's management, exercise the requisite discretion and independent judgment with respect to matters of significance. See 29 C.F.R. § 541.202(b). The final rule identifies human resources managers, who perform similar duties interpreting and implementing employment policies, as exempt and it distinguishes as nonexempt those personnel clerks who simply screen applicants to obtain data regarding qualifications and to identify those who do not meet the minimum required standards. See 29 C.F.R. § 541.203(e).

Based on analysis of the information provided, it is our opinion that Staffing Managers employed by Company X qualify for the administrative exemption under the final rule at 29 C.F.R. § 541.200. We are unable to make a determination regarding the applicability of the executive exemption to Staffing Managers in this case, because there is insufficient information as to whether the Staffing Managers' primary duty is management of a customarily recognized department or subdivision with a permanent status and a continuing function, or a mere collection of employees assigned from time to time to a specific job or series of jobs. See 29 C.F.R. § 541.103(a).

This opinion is based exclusively on the facts and circumstances described in your request and is given based on 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 letter might require a conclusion different from 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 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*, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that this letter is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures: 29 C.F.R. Part 541
69 Fed. Reg. 22143
WH Opinion Letters dated August 11, 1970 and October 14, 1983

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