



June 29, 2006

FLSA2006-14NA

Dear **Name***:

This is in response to your request for an opinion on the exempt status of an employee working for your company who performs work involving the preparation of bids on government contracts under the Fair Labor Standards Act (FLSA). In a telephone conversation with a member of the Solicitor's Office, you supplemented the information that was in your letter about the employee's job duties. In that conversation, you also indicated that your question involves the exemption in section 13(a)(1) and the possible classification of the employee in question as an exempt administrative employee. Based upon the description of the job duties that you provided, we conclude that the employee does not qualify for the administrative exemption under the revised regulations at 29 C.F.R. Part 541, which became effective on August 23, 2004. See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122 (April 23, 2004).

Your company performs environmental consulting and remediation work, primarily for the federal government. Your company obtains work by preparing bids for government contracts in response to Requests for Proposals. You stated that the employee in question, who has an M.A. degree in English, reviews bid proposals, client correspondence, client reports, and reports to government regulators. The employee spends approximately 55% of her time editing the bids prepared by technical experts for grammar, spelling, and punctuation mistakes and ensuring that the bids are written in plain English. You also indicated that she spends about 30% of her time checking spreadsheets and cost estimates of bids prepared by other employees for accuracy and completeness and about 15% of her time preparing status reports on the employer's various projects. In the telephone conversation, you stated that the employee does not have any input into the substantive technical, environmental, or scientific aspects of the bids because other employees perform all such work.

The FLSA regulations at 29 C.F.R. Part 541 establish three different requirements for exemption relating to the salary level of employees, the salary basis of payment, and required duties. The regulations generally provide that employees must be paid at least \$455 a week on a salary basis in order to qualify for exemption from the FLSA's minimum wage and overtime requirements. We assume for purposes of this letter that the employee satisfies both of these requirements.

With respect to the duties requirements for the administrative exemption, the regulations require that the employee's primary duty 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" and the employee's primary duty must include "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a) (copy enclosed).

"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) (copy enclosed). 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; insurance; quality control; purchasing; advertising; marketing; research; safety and health; personnel management; employee benefits; and labor relations; and similar activities. 29 C.F.R. § 541.201(b) (copy enclosed). An employee



also 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, such as acting as a tax adviser or financial consultant to the employer's clients or customers. 29 C.F.R. § 541.201(c) (copy enclosed).

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) (copy enclosed).

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) (copy enclosed). 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 mentioned above are exercising discretion and independent judgment, although a case-by-case analysis is required." 69 Fed. Reg. 22,143.

The regulations state that the "exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision." 29 C.F.R. § 541.202(c) (copy enclosed). The regulations further emphasize that "the exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards," and that it "does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work." 29 C.F.R. § 541.202(e) (copy enclosed).

The regulations provide examples of types of employees who generally meet the duties requirements, including the exercise of the requisite discretion and independent judgment, as well as employees who typically do not. For example, the regulations identify an employee who leads a team of employees assigned to complete a major project such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements as an employee who



generally will meet the duties test requirements. 29 C.F.R. § 541.203(c) (copy enclosed). The regulations identify, as a contrasting example, public sector inspectors or investigators, such as building or construction inspectors, health or sanitation inspectors, or environmental or soils specialists, as employees who generally “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.” 29 C.F.R. § 541.203(j) (copy enclosed). Employees performing such work follow well-established techniques and procedures and “rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.” 29 C.F.R. § 541.203(g) (copy enclosed).

After reviewing the information you provided, we believe that the employee’s primary duty does not involve the requisite exercise of discretion and independent judgment with respect to matters of significance. The employee’s primary activities involve reviewing bids, correspondence, and reports prepared by technical experts for grammar, spelling, and punctuation mistakes and ensuring that the bids are written in plain English. She also checks spreadsheets and bid cost estimates prepared by other employees for accuracy and completeness, and prepares weekly and monthly status reports. Other employees are responsible for creating the substantive aspects of the project – the technical, environmental, and scientific portions. Therefore, we conclude that the employee is not exempt because her work does not involve the independent authority to make decisions with regard to matters of significance of the types identified at 29 C.F.R. § 541.202(b) as typical of exempt status (*e.g.*, the authority to formulate, interpret or implement management policies or operating practices; authority to commit the employer in matters that have significant financial impact; and authority to waive or deviate from established policies and procedures without prior approval).

Instead, the employee’s work is more similar to that of the nonexempt inspectors, examiners and investigators described in 29 C.F.R. § 541.203(g)-(j) (copy enclosed), because her duties primarily involve the use of skills and technical abilities in following known standards or criteria in editing other employees’ work. See Wage and Hour Opinion Letter August 19, 2005 (background investigators of potential government employees seeking security clearances who interview witnesses and obtain information regarding subject’s financial, employment, medical and educational background are utilizing skills in applying known standards or established techniques as opposed to exercising discretion and independent judgment); Wage and Hour Opinion Letter January 7, 2005 (junior-level claims adjusters who simply gather statements from claimants, employer’s witnesses and health care providers by telephone, but do not make determinations regarding coverage or liability or negotiate settlements of disputed claims, are not exempt) (copies enclosed). See also *Martin v. Indiana Michigan Power Company*, 381 F.3d 574, 583 (6th Cir. 2004) (employee who is not involved in design or development of company’s computer network, does not decide what software will be available, and does not decide what work stations or equipment will be used or when it will be replaced, but who simply sets up and repairs parts of a system designed by others, is not administratively exempt). Thus, the employee in question does not qualify for the administrative exemption.

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



U.S. Department of Labor
Employment Standards Division
Wage and Hour Division

investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this is responsive to your inquiry.

Sincerely,

Barbara R. Relerford
Office of Enforcement Policy
Fair Labor Standards Team

Enclosures:

29 C.F.R. 541 § 200(a)
29 C.F.R. 541 §§ 201(a)-(c)
29 C.F.R. 541 §§ 202(a)-(c), (e)
29 C.F.R. 541 §§ 203(c), (j)-(g)
Wage Hour Opinion Letter August 19, 2005
Wage Hour Opinion Letter January 7, 2005

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