



March 10, 2006

FLSA2006-6

Dear Name*:

This is in response to your letter concerning the application of Section 13(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(1) (copy enclosed), to certain employees of your client. You request that we assume that your client has correctly classified these employees as exempt under Section 13(a)(1) of the FLSA as bona fide executive, administrative or professional employees. For purposes of this response, we will also assume that your client is an enterprise subject to the provisions of the FLSA.

You ask whether implementation of two new job requirements that your client is considering would result in loss of the exemption. First, your client wishes to require exempt employees to work either 45 or 50 hours a week, depending on whether they are officers of the company. Second, your client wishes to require, at its option, that exempt employees make up work time lost due to personal absences of less than a day. Your client would not dock the salary of any such employees for a failure to meet either requirement but consistent failure to observe the proposed requirements would result in "discipline up to and including discharge." You state that all of the employees in this group receive a salary of at least \$544 per week.

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 of the revised overtime security regulations, which took effect August 23, 2004 (copy enclosed). An employee may qualify for exemption if all of the pertinent tests relating to duty, salary level, and salary basis are met. "An employee will be considered to be paid on a 'salary basis' within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in [29 C.F.R. § 541.602(b) (copy enclosed)], an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available." 29 C.F.R. § 541.602(a) (copy enclosed).

You make clear that the employer would not dock an employee's salary regardless of whether the employee violated the two new rules. Thus, based on the information you have provided, the client is free to implement the two rules without loss of the exemption. The number of hours worked by an employee who is exempt under Section 13(a)(1) of the FLSA is a matter to be determined between the employer and the employee. An employer may require an exempt employee to make up work time lost due to personal absences of less than a day without loss of the exemption under Section 13(a)(1). See *Cowart v. Ingalls Shipbuilding, Inc.*, 213 F.3d 261 (5th Cir. 2000). As the preamble to the final rule explains, an employer may require an exempt employee to do things such as to record and track hours and to work a specified schedule without affecting the employee's exempt status. See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,178 (Apr. 23, 2004) (copy enclosed). Please note, however, that the failure to make up the time as required or to work the required number of hours does not constitute a violation of a "workplace conduct rule" for which an employer may impose a disciplinary suspension for one or more full days pursuant to the new rule at 29 C.F.R. § 541.602(b)(5) (copy enclosed). Such rules must be applicable to all employees and must relate to workplace "conduct, not performance or attendance issues." See 69 Fed. Reg. at 22,177.

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:

Section 13(a)(1) of the FLSA

29 C.F.R. Part 541

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Preamble to the Final Rule. 69 Fed. Reg. 22,122
(Apr. 23, 2004)

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