



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

March 2, 2009

Dear **Name***:

Enclosed is the response to your request for an opinion letter signed by the then Acting Wage and Hour Administrator Alexander J. Passantino on January 16, 2009 and designated as Wage and Hour Opinion Letter FLSA2009-31. It does not appear that this response was placed in the mail for delivery to you after it was signed. In any event, we have decided to withdraw it for further consideration by the Wage and Hour Division. We will provide a further response in the near future.

The enclosed opinion letter, and this withdrawal, are issued as official rulings 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). Wage and Hour Opinion Letter FLSA2009-31 is withdrawn and may not be relied upon as a statement of agency policy.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement



FLSA2009-31

This Opinion Letter is withdrawn.

January 16, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether Consultants, Clinical Coordinators, Coordinators, and Business Development Managers employed by your company qualify for exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA).^{*} It is our opinion that they are exempt administrative employees.

You state that the company provides temporary medical professionals (TMPs), primarily registered nurses, to hospitals (client facilities). The employees discussed below work at the company's headquarters and help support the TMPs and the client facilities. We understand the Consultants, Clinical Coordinators, Coordinators, and Business Development Managers receive at least \$455 per week on a salary basis and, as discussed below, have authority to make independent choices, free from immediate direction or supervision, in matters of significance.

Consultants

The Consultants' primary duties include: generating referrals through networking, internet searches, and job fairs; determining whether an individual has the skills and experience necessary to be a TMP; determining the validity and appropriateness of candidate references; determining through personal interviews the candidate's work history, work ethic, sincerity, credibility, interpersonal skills, strengths, weaknesses, and ability to work successfully; recommending candidates for rejection; matching candidates to the appropriate client facility; negotiating the TMP pay rates and benefits package; and supervising and counseling TMPs to resolve such non-clinical issues as housing complaints, timeliness of payroll, insurance documentation, and attendance problems. In a discussion with Wage and Hour Division (WHD) staff, you stated that the Consultants, after screening and interviewing candidates for a specific position available in a client facility, recommend the best candidate for hiring to the Clinical Coordinator. The Clinical Coordinator then contacts the client facility to determine proper fit. The Consultants' recommendations for hiring are typically accepted. Once a client facility decides to hire a TMP, Consultants are responsible for ensuring completion of the hiring process. The Consultants then serve as supervisors for the TMPs working at client facilities, working to resolve issues that may arise between the TMP and the client.

Clinical Coordinators

The Clinical Coordinators' primary duties include serving as the company's main resource on clinical issues and the expert on company clinical requirements related to the licensing,

^{*} Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

certification, and amount of experience necessary for TMP applicants based on state regulations and individual hospital preferences; persuading client facilities to interview and select candidates; making final determinations regarding the candidates' employment eligibility; negotiating with client facilities for bonuses and higher bill rates for exceptional candidates; taking a lead role in preparing for reviews and audits conducted by hospital associations and the Joint Commission for Accreditation of Healthcare Organizations (JCAHO); working with client facilities to monitor the TMPs' performance; serving as a second-line supervisor to counsel and discipline TMPs regarding such clinical matters as shortcutting protocol procedures and such behavioral issues as the TMP's unprofessional conduct toward the patient's family or the head nurse; and training Consultants and other employees. Clinical Coordinators serve as primary representatives to the company's client facilities. They must be licensed nurses with at least three years of acute care experience.

Coordinators

Coordinators perform the same duties as the Clinical Coordinators except that the Coordinators do not serve as the company's primary resource with respect to the clinical issues and requirements described above. In your discussion with WHD staff, you noted that due to their many years of experience, Coordinators can fulfill their job responsibilities without having a registered nursing degree. Coordinators simply refer clinical questions with which they are unfamiliar to the Clinical Coordinator.

Business Development Managers

The Business Development Managers' (BDMs) primary duties include: analyzing existing market conditions by geographic territory to determine the need for TMPs, competitors' capabilities, and competitive billing and pay rates; analyzing the client facilities' staffing needs, bill rate tolerance, and contract expectations; preparing initial marketing materials that are tailored to the client facilities' expectations; developing, preparing, submitting, and monitoring proposals in response to requests from current and prospective client facilities; developing pricing strategies based on market conditions, analysis of client facilities' past and current service activity, their ongoing clinical needs and tolerance for bill rate increases, and the company's desired revenue and margin requirements; negotiating contractual terms and conditions of the staffing agreements; negotiating revisions and writing addendums to current agreements; serving as liaison between the client facility and the company to resolve service or billing issues; and visiting current and prospective client facilities to develop or enhance contractual relationships.

Section 13(a)(1) of the FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide administrative capacity as defined in 29 C.F.R. Part 541. An employee may qualify for the exemption if the salary and duties tests are met.

Under [29 C.F.R. § 541.200\(a\)](#), "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.

Id. The phrase “work directly related to the management or general business operations of the employer or the employer’s customers” refers to work in such functional areas as research, marketing, personnel management, and human resources. *Id.*; [29 C.F.R. § 541.201\(b\)](#). Moreover, section [541.202\(b\)](#) cites several factors “to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance,” including “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 has authority to commit the employer in matters that have significant financial impact; . . . whether the employee provides consultation or expert advice to management; . . . [and] whether the employee investigates and resolves matters of significance on behalf of management.”

Section [541.203\(e\)](#) further clarifies that “[h]uman resources managers who . . . interpret or implement employment policies . . . generally meet the duties requirements for the administrative exemption.” For example, “when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes . . . recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work.” *Id.*

Consultants

We believe that the Consultants’ primary duties of screening, interviewing, and recommending candidates for hiring; supervising and counseling TMPs to resolve such issues as housing complaints and timeliness of payroll; and addressing client facility concerns regarding the TMPs’ attendance problems directly relate to the functional areas of personnel management and human resources. Therefore, the Consultants’ primary duties involve the “performance of office or non-manual work directly related to the management or general business operations of the employer” and the employer’s clients. 29 C.F.R. § 541.200(a)(2).

Moreover, we believe that the Consultants’ primary duties “include[] the exercise of discretion and independent judgment with respect to matters of significance.” 29 C.F.R. § 541.200(a)(3). As noted previously, Consultants have authority to make independent choices, free from immediate direction or supervision, in matters of significance. By screening, interviewing, recommending for hiring, and negotiating the candidates’ compensation and benefits packages, Consultants have “the authority to affect, interpret, or implement management policies or operating practices.” 29 C.F.R. § 541.202(b). As described in section 541.203(e), duties such as screening, interviewing, and recommending for hire that are performed, for example, by a human resources manager (as opposed to a personnel clerk), constitute exempt work. As you

represented to WHD staff, Consultants' hiring recommendations are generally followed by the company, an example of Consultants' independent decision-making authority. *See* 29 C.F.R. § 541.200(a); 29 C.F.R. § 541.202(b). Additionally, by supervising and counseling TMPs and addressing client facility concerns to resolve the issues noted above, Consultants "investigate and resolve matters of significance on behalf of management." 29 C.F.R. § 541.202(b).

Based on a review of the information provided, Consultants meet the requirements of 29 C.F.R. § 541.200(a)(1)-(3). Therefore, it is our opinion that the Consultants are exempt administrative employees. *See* Wage and Hour Opinion Letter [FLSA2005-45 \(Oct. 25, 2005\)](#).

Clinical Coordinators and Coordinators

We believe that the Clinical Coordinators' and the Coordinators' primary duties of working with client facilities to monitor TMPs' performance; serving as second-line supervisors to counsel and discipline TMPs regarding clinical and behavioral issues; and training Consultants and other employees directly relate to the functional areas of personnel management and human resources. *See* 29 C.F.R. § 541.201(b). Therefore the Clinical Coordinators' and the Coordinators' primary duties involve the "performance of office or non-manual work directly related to the management or general business operations of the employer" and the employer's clients. 29 C.F.R. § 541.200(a)(2).

Moreover, we believe that the Clinical Coordinators' and the Coordinators' primary duties "include[] the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(3). By serving as the company's primary resource on clinical issues, Clinical Coordinators "provide[] . . . expert advice to management." 29 C.F.R. § 541.202(b). Additionally, by taking a lead role in preparing for reviews and audits conducted by hospital associations and the JCAHO, Clinical Coordinators and Coordinators "carr[y] out major assignments in conducting the operations of the business." *Id.* Also, by serving as second-line supervisors to counsel and discipline TMPs regarding clinical and behavior issues, and training Consultants and other employees, Clinical Coordinators and Coordinators "perform[] work that affects business operations to a substantial degree." *Id.* Finally, by making the final determination regarding candidates' employment eligibility and negotiating with client facilities for bonuses and higher billing rates for exceptional candidates, Clinical Coordinators and Coordinators have authority to "interpret, or implement management policies or operating practices." *Id.* Clinical Coordinators and Coordinators also assess client needs and serve as primary contacts for clients, responsibilities that federal courts have found relevant in assessing whether an employee exercises discretion and independent judgment. *See* 69 Fed. Reg. 22,144 (preamble to Part 541 regulation).

Based on a review of the information provided, Clinical Coordinators and Coordinators meet the requirements of 29 C.F.R. § 541.200(a)(1)-(3). Therefore, it is our opinion that Clinical Coordinators and Coordinators are exempt administrative employees. *See* Wage and Hour Opinion Letter FLSA2005-45 (Oct. 25, 2005).

Business Development Managers

We believe that the BDMs' primary duties of analyzing existing market conditions to determine the need for TMPs, competitors' capabilities, and competitive billing and pay rates; and analyzing the client facilities' staffing needs, bill rate tolerance, and contract expectations, among others, directly relate to the functional area of research. *See* 29 C.F.R. § 541.201(b). Additionally, the BDMs' primary duties of preparing initial marketing materials that are tailored to the client facilities' expectations and visiting current and prospective client facilities to develop or enhance contractual relationships directly relate to the functional area of marketing. *Id.*

We also believe that the BDMs' primary duties "include[] the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(3). BDMs "perform[] work that affects business operations to a substantial degree" by analyzing market conditions to determine the need for TMPs, competitors' capabilities, and competitive billing and pay rates; analyzing client facilities' staffing needs, bill rate tolerance, and contact expectations; and by developing pricing strategies based on the analyses. 29 C.F.R. § 541.202(b). Additionally, by negotiating contractual terms and conditions of the staffing agreements and negotiating revisions to current agreements, BDMs have "authority to commit the employer in matters that have significant financial impact." *Id.* Also, by serving as liaison between the client facility and the company to resolve service or billing-related issues, BDMs "investigate[] and resolve[] matters of significance on behalf of management." *Id.*

Based on a review of the information provided, BDMs meet the requirements of 29 C.F.R. § 541.200(a)(1)-(3). Therefore, it is our opinion that BDMs are exempt administrative employees.

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 issues 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.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

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