



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 FLSA2009-26. 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 Wage and Hour Opinion Letter FLSA2009-26 is withdrawn and may not be relied upon as a statement of agency policy.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement



FLSA2009-26

This Opinion Letter is withdrawn.

January 16, 2009

Dear **Name***:

This is in response to your request for an opinion regarding whether client service managers (CSMs) at an insurance company qualify for the administrative exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA).^{*} It is our opinion that the CSMs are exempt administrative employees.

Your agency sells a wide range of insurance products, from personal and business insurance to professional liability insurance, and employs CSMs who are professional, licensed insurance agents. The CSMs' primary duty is generally to serve as insurance advisers and consultants to the agency's clients. The agency separately employs individuals whose duties it is to sell insurance products. CSMs have the authority to execute insurance and finance contracts that legally bind your agency and its clients. CSMs help the clients recognize the need for insurance coverage to guard against unforeseen risk and loss. They work with the clients to develop an insurance program that will adequately respond to the client's total risk management needs. To that end, CSMs consult with the client to identify risk and exposure, advise on the proper values for the client's assets, and then recommend solutions to manage the client's risk and exposure. After selecting the proper insurance package for each client, they act as a liaison between the client and the insurance company and gather and pass underwriting information about the client to the insurance company. Additionally, CSMs audit the client's selected insurance program to ensure it meets all regulatory compliance matters. You indicate that CSMs use their own discretion and independent judgment when advising clients and are generally not required to seek prior approval for the advice and counsel they provide. They are free from immediate supervision or direction. Finally, CSMs are compensated in excess of \$455 per week.

Section 13(a)(1) of the FLSA exempts from its minimum wage and overtime pay provisions "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The exemption is determined not by occupational title or job classification, but rather by the duties and salary of the individual employee involved. See [29 C.F.R. § 541.2](#).

As discussed in [29 C.F.R. § 541.200](#), 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
...;

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

(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.

An employee whose primary duty is directly related to the management or general business operations of the employer “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\(a\)](#). This “includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; . . . employee benefits; . . . legal and regulatory compliance; and similar activities.” 29 C.F.R. § 541.201(b). Additionally, as stated in section 541.200(a)(2), the exemption may apply to an employee whose primary duty includes “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).

We assume for purposes of this response that the CSMs receive at least \$455 a week on a salary basis. *See* [29 C.F.R. § 541.600](#). Further, because the CSMs serve as insurance advisers and consultants to your clients, they perform office or non-manual work directly related to the management or general business operations of the employer's customers. 29 C.F.R. §§ 541.201(b); 541.201(c). Therefore, we will focus on whether their primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

To qualify for the administrative exemption, an employee's primary duty must also include the exercise of discretion and independent judgment with respect to matters of significance. *See* 29 C.F.R. § 541.200(a)(3). This “involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.” [29 C.F.R. § 541.202\(a\)](#). Some factors to consider when making this determination are:

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.

29 C.F.R. § 541.202(b). 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. *See* 69 Fed. Reg. 21,122, 22,143 (Apr. 23, 2004).

Based on the information provided, it appears the CSM's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. Serving as an insurance adviser and consultant to your agency's clients and helping each client select the proper insurance package involves comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered. *See* 29 C.F.R. § 541.202(a). When doing this task, the CSM analyzes the client's insurance needs and compares these needs to the insurance packages available, taking into account the level of risk and the price of the coverage. This service is a significant matter to the agency's clients. Furthermore, since the CSMs have the authority to execute insurance and finance contracts and legally bind the agency and its clients, the CSMs have the authority to commit their employer in matters that have significant financial impact and to negotiate and bind the company on significant matters. 29 C.F.R. § 541.202(b). Finally, CSMs use their own discretion and independent judgment and are free from immediate supervision when advising clients. Thus, it appears the CSMs primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Additionally, [29 C.F.R. § 541.203](#) includes specific examples of occupations that would generally meet the administrative duties test, including in paragraph (b) "[e]mployees in the financial services industry," who perform duties similar to the CSMs' duties. Such employees are ordinarily considered to meet the duties requirements for the administrative exemption if their duties include:

work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

29 C.F.R. § 541.203(b); *see also* Wage and Hour Opinion Letter [FLSA2006-43 \(Nov. 27, 2006\)](#); Defining and Delimiting the Exception for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 21,122,146 (Apr. 23, 2004). In advising each client on which insurance package best suits that client's individual needs, concerns, risk, and exposure, the CSM analyzes information such as the client's income, assets, investments, or debts; takes into account all the data and then determines and recommends the best insurance package for the client; and advises the client on the advantages and disadvantages of the available insurance packages. As previously stated, some of the CSM's specific day-to-day duties include consulting with the client to identify risk and exposure, advising on determining proper values for the client's assets, and then recommending solutions to manage the client's risk and exposure. Finally, the CSM's primary duty is to serve as an insurance adviser and consultant to the agency's clients, not selling an insurance product.

Therefore, it is our opinion that CSMs meet all three requirements of the administrative exemption and are accordingly exempt from the minimum wage and overtime requirements of the FLSA.

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).**