



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 FLSA2009-34. 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 Wage and Hour Opinion Letter FLSA2009-34 is withdrawn and may not be relied upon as a statement of agency policy.

Sincerely,

John L. McKeon
Deputy Administrator for Enforcement



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

FLSA2009-34

This Opinion Letter is withdrawn.

January 16, 2009

Dear **Name***:

This is in response to your request for an opinion concerning whether out-of-town coordinators (Coordinators) qualify for the administrative exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA).¹ Based on a review of the information provided, it is our opinion that the Coordinators are exempt administrative employees.

You state that your client is a product-demonstration company (Company). Product-demonstration companies implement product-demonstration events for national marketing firms and manufacturers and coordinate the staffing of such events at the locations and during the times that the manufacturers or marketing firms request. For events conducted in locations distant from the Company's corporate offices, the Company employs Coordinators to perform such functions as establishing and maintaining relationships with a large number of freelance product demonstrators (demonstrators) and engaging them to staff these events.

The primary duties of a Coordinator include developing and implementing strategies for recruiting and maintaining relationships with a large number of demonstrators including those who possess special skills or credentials, such as foreign language proficiency or a specific license or certification; determining the amount of effort to devote to expanding the pool of demonstrators; ensuring that a demonstrator executes a contract before performing an event; determining the order in which to staff events that are held in multiple sites in different locations; acting as liaison to managers of retail locations where events are scheduled; developing a contingency plan for demonstrator no-shows or late cancellations and any problems that may arise; assessing the viability of a project and advising the Company on whether the client's terms and conditions are realistic in the Coordinator's local market; keeping the Company apprised of ideas or concerns expressed by demonstrators; receiving and resolving store or demonstrator complaints; and facilitating the communication and transfer of information and client materials between the Company and demonstrators. The Coordinators perform office or non-manual work.

The Coordinator assumes complete responsibility for ensuring that the appropriate number of demonstrators appear at the assigned events with the materials provided by the Company's clients. Occasionally, the Company provides the Coordinator with a list of demonstrators in the Coordinator's geographic territory. The Coordinator, however, decides whether to offer opportunities to demonstrators from the Company list or to rely

¹ Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

on his or her own local contacts. The Coordinator develops and executes a strategy for any problems that may occur. For example, if an event is at a remote location and the Coordinator receives feedback from demonstrators that the client fee is insufficient, the Coordinator can negotiate with the Company to seek higher demonstrator pay in order to attract enough demonstrators to conduct the event.

The Company does not provide Coordinators with guidelines or rules on how to perform their duties. The Coordinators operate without any direct supervision and must rely on their own judgment in performing their duties. In fact, the Company often does not learn about a problem at an event until after the event is completed.

The Coordinators perform duties critical to the Company's national operations. You state that without the logistics and coordination functions that Coordinators perform, the Company's business model would collapse.

The Company pays Coordinators on a project-by-project basis. The fee established for a particular project depends on numerous factors, such as the number and remoteness of event locations involved, the amount of lead time for the events, whether demonstrators require special skills or expertise, the difficulty level of the particular event, and the number of demonstrators required. Each project presents its own issues and difficulties. Thus, when negotiating a fee, the parties take into account many variables.

The fee is a flat amount that is subject only to possible reductions for nonperformance. For example, one engagement could consist of fifteen events, with three events being held at each of five different stores and four demonstrators for each event. For this project, the Coordinator's fee could be \$800, subject to possible reduction, *e.g.*, for one or more events not performed. The fee is not subject to increase and is not affected by the number of hours actually devoted to the project. The fee, when translated into an hourly rate, exceeds \$11.38 per hour (\$455 divided by 40 hours).

Section 13(a)(1) of the FLSA provides a complete 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 administrative exemption if all of the pertinent tests relating to duties and salary are met.

As stated in [29 C.F.R. § 541.200\(a\)](#), 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 . . . ;
- (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.

We examine each of the necessary elements in the administrative exemption below.

First, the regulations allow payment on a fee basis for administrative employees. *See* 29 C.F.R. §§ 541.200(a)(1), 541.605(a). The fee basis is payment of “an agreed sum for a single job” regardless of completion time. [29 C.F.R. § 541.605\(a\)](#). A fee “is paid for the kind of job that is unique” in contrast to payment on a piece rate basis. *Id.* Also, payments based on hours worked or days worked would not be considered payments on a fee basis. Moreover, a fee will satisfy the salary requirement if the rate “would amount to at least \$455 per week if the employee worked 40 hours.” 29 C.F.R. § 541.605(b).

Second, in the context of the administrative exemption, 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 marketing, personnel management, and human resources. [29 C.F.R. § 541.201\(a\)-\(b\)](#).

Third, “an employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.” [29 C.F.R. § 541.202\(a\)](#). 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 includ[ing] . . . authority to formulate, affect, interpret, or implement management policies or operating practices; [and] perform[ing] work that affects business operations to a substantial degree.”

After reviewing the information provided, we believe that the Company’s fee payment plan meets the salary requirements of § 541.605(a). The factors described above that determine the fee amount for a particular project indicate that this “kind of job . . . is unique.” *Id.* In fact, the fee is negotiated by taking into account many variables. Thus, the fee is not “for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again.” *Id.* Moreover, the fee amount is not affected by the number of hours actually devoted to the particular project. *Id.* Also, since you state that the fee paid would exceed \$455 per week if the Coordinator worked 40 hours, the Company’s fee payment plan meets the requirements of § 541.605(b). Therefore, the Coordinators receive at least \$455 per week on a fee basis. *See* 29 C.F.R. § 541.200(a)(1).

We also believe that the Coordinator’s primary duties of developing and implementing strategies for recruiting and maintaining relationships with demonstrators, deciding how much effort to devote to expanding the pool of demonstrators, ensuring that a demonstrator executes a contract before conducting an event, and receiving and resolving demonstrator complaints, all directly relate to the functional areas of personnel management and human resources. Additionally, the Coordinator’s primary duties of ensuring that the appropriate number of demonstrators staff events, and are fully prepared for them, determining the order in which to staff events, acting as liaison to managers of retail locations where events are scheduled, and developing a contingency plan for demonstrator no-shows or late cancellations, are each directly related to the functional area of marketing as it applies to the Company’s clients. Therefore, the Coordinator’s primary duty involves 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), 541.201(b).

Moreover, we believe that the Coordinator's 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 described above, Coordinators operate without direct supervision. Examples of duties that indicate Coordinators have "authority to make an independent choice, free from immediate direction or supervision" include determining the amount of effort devoted to expanding the pool of demonstrators, deciding whether to offer opportunities to demonstrators from the Company list or to rely on his or her own local contacts, determining the order in which to staff events, and developing a contingency plan for demonstrator no-shows or late cancellations and any problems that may arise. These duties, along with developing and implementing strategies for recruiting and maintaining relationships with demonstrators, satisfy one of the factors under section 541.202(b), that the employee "has authority to formulate, affect, interpret, or implement management policies or operating practices." Additionally, by assuming complete responsibility upon assignment of a project, including developing and executing a strategy for any problems that may arise, the Coordinator "performs work that affects business operations to a substantial degree." *Id.* Also, by assessing the viability of a project and advising the Company on whether the client's terms and conditions are realistic in the Coordinator's local market, the Coordinator "provides consultation or expert advice to management." *Id.* Finally, by receiving and resolving store or demonstrator complaints, the Coordinator "investigates and resolves matters of significance on behalf of management." *Id.*

Based on a review of the information provided, the Coordinators meet the requirements of section 541.200(a)(1)-(3). Therefore, it is our opinion that the Coordinators 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).**