

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WASHINGTON, D.C. 20210

RR.
504
21 AB 102
21 BA 710
21 BA 810
21 2A 910

2 AUG 1974

This is in reply to your letter of May 13, 1974, concerning the application of the amended Fair Labor Standards Act to State legislative employees. You ask whether all employees in the legislative branch of a State government are excluded from the definition of "employee" under the Act.

The precise language in section 3(a)(2)(C) includes as an employee under the Act "any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual --

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who --

- (I) holds a public elective office of that State, political subdivision, or agency,
- (II) is selected by the holder of such an office to be a member of his personal staff,
- (III) is appointed by such an officeholder to serve on a policymaking level, or
- (IV) who is an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office."

In applying this exclusionary provision, the person concerned must first be outside the civil service laws or regulations of the governmental jurisdiction involved. Secondly, the person must fit in one of the four categories listed. The first category is restricted, of course, to those persons who are elected by the voters in the pertinent jurisdiction. The fourth category, that of an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office, is limited to that of a legal advisor, i.e., a lawyer.

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With respect to the second and third categories (members of the officeholder's personal staff and appointees of the officeholder who serve on a policymaking level) among the tests to be considered are the following:

- (1) is the person's employment entirely at the discretion of the elected officeholder;
- (2) is the position not subject to approval or clearance by the personnel department or division of any part of the government;
- (3) is the work performed outside of any position or occupation established by a table of organization as part of the legislative branch or committee or commission formed by an act of the legislature;
- (4) is the person's compensation dependent upon a specific appropriation or it is paid out of an office expense allowance provided to the officeholder;

Of course, employees who are not excluded by the provisions of section 3(a)(2)(C) may be considered for exemption as bona fide executive, administrative, and professional employees under section 13(a)(1) of the Act as defined and delimited in Regulations, Part 541, issued pursuant thereto.

We hope this information will provide the necessary guidance you seek.

Sincerely,

Signed

Betty Southard Murphy
Administrator
Wage and Hour Division

Enclosures