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



30 APR 1975

Your letter of October 1, 1974, addressed to our Cleveland, Ohio, office has been referred to this office for reply. We regret that the volume of correspondence received in connection with the 1974 Amendments to the Fair Labor Standards Act did not enable us to respond sooner.

You request a ruling to the effect that all employees of the City of ██████ are covered by the Fair Labor Standards Act except for employees specifically exempted as Executive, Administrative, Professional, etc.

The express statutory language of section 3(e)(2)(C) of the Act makes it clear that any individual employed by a State, political subdivision of a State, or an interstate governmental agency is an employee for the purposes of the Fair Labor Standards Act, unless otherwise excluded therefrom. The only individuals of such public agencies specifically excluded as employees are those identified in subsections (i) and (ii) of section 3(e)(2)(C). As indicated, an individual to be excluded must meet two tests.

The first test to be met is that the individual not be subject to the civil service laws of the state, political subdivision, or agency which employs him. The second test to be met is that the individual fit into one of the following four categories:

(1) The individual holds a public elective office of that State, political subdivision, or agency. This category is restricted to those persons who are elected by the voters of the pertinent jurisdiction.

(2) The individual is selected by the holder of such elective office to be a member of his personal staff.

(3) The individual is appointed by the holder of such elective office to serve on a policymaking level.

With respect to categories (2) and (3), the following are some of the tests that are to be considered:

(a) Is the individual's employment entirely at the discretion of the elected officeholder?

(b) Is the position to be filled by the individual not subject to approval or clearance by the personnel department or other division of any part of government?

(c) Is the work to be performed by the individual outside of any position or occupation established by a table of organization as part of the executive, legislative, or judicial branch of government?

(d) Is the person's compensation dependent upon a specific appropriation or is it paid out of an office expense allowance provided to the elected officeholder?

(4) The individual is an immediate advisor to such an elected officeholder with respect to the constitutional or legal powers of his office. This category is restricted to legal advisors, i.e., attorneys.

With regard to the executive, administrative or professional employees referred to in your letter, we wish to indicate that even though such employees may qualify for the exemption from both the minimum wage and overtime compensation provisions of the Act pursuant to section 13(a)(1) thereof, they would still be included in the term "employee" for all purposes of the Act.

It should be noted that the matter of the constitutionality of the applicability of the Fair Labor Standards Amendments of 1974 to certain employees of State and Local Governments is before the Supreme Court in the case of National League of Cities, et al. v. Brennan.

Sincerely,

/s/ Warren D. Landis

Warren D. Landis
Administrator
Wage and Hour Division