

**FLSA-709**

October 4, 1982

This is in further reply to your letter of August 3, 1982, concerning the application of section 13(a)(1) of the Fair Labor Standards Act to certain personnel recruiters employed by \*\*\*. You wish to know whether recruiters classified as account executives, associate account executives, or account managers may be considered exempt administrative or outside sales employees as defined in section 541.2 and 541.5 of Regulations, 29 CFR Part 541.

Your letter indicates that the recruiters specialize in functional area such as insurance, accounting and finance, data processing, and so forth. Their general duties consist of developing clients and contacts in the field in which the recruiter specializes. Recruiters develop their own clients through personal contact and determine the type of personnel which the client requires through such contact and counseling. Recruiters keep informed of labor market conditions and salaries. Upon receiving a job order the recruiter searches his/her files, writes and places advertisements or uses other appropriate methods to recruit personnel. Recruiters screen and interview potential applicants to determine suitability for the client's needs. Upon locating an applicant deemed suitable for the client's needs, the recruiter arranges an interview between client and potential applicant, and then performs any necessary follow-through. Recruiters have additional duties relating to development of the employer's business by developing filing and indexing systems to expedite applicant retrieval, improving methods of client solicitation, and improving methods of applicant referral.

According to the position descriptions enclosed with your letter, recruitment duties are generally similar. However, the account manager recruits exclusively for those client companies under exclusive contract with . The associate account executive is required to establish and maintain client relationships, while the account executive primarily appears to recruit and place applicants in response to available job orders.

Your letter does not provide sufficient information for us to make a definite determination regarding the recruiters' status as administrative employees under section 541.2. However, the following discussion may be of assistance to you. In determining whether or not an employee is exempt under section 13(a)(1) of the FLSA as a bona fide administrative employee, all tests relating to duties, responsibilities, and salary in section 541.2 of the regulations must be met. One test requires that such an employee exercise discretion and independent judgment.

Whether a recruiter exercises discretion and independent judgment within the meaning of the regulations would depend, to a great extent on the amount of selectively exercised in matching persons seeking employment with the requirement of the job order and in deciding which applicant to send to a particular client for consideration, as opposed to referring to the client several prospects who generally meet the qualifications for the job. This is a crucial element in the determination and the question is often a close one.

An employee who merely applies his/her knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of section 541.2. This is true even if there is some lee-way in reaching a conclusion, as when acceptable standards include a range or a tolerance above or below a specific standard. See section 541.207(a). Thus, the exempt or nonexempt status of a particular employee would depend on the actual facts, and cannot be determined based upon a job title or job description. In addition, your letter does not provide information concerning whether the salary test is met. In this regard, see sections 541.2(e) and 541.118.

From the information you have provided, the recruiters would not be considered outside salespersons

within the meaning of the regulations. Section 541.5 requires that an outside salesperson be customarily and regularly engaged "away from his employer's place or places of business" in making sales or obtaining orders. To qualify as an outside salesperson, an employee must spend at least 80 percent of his/her time in making sales or obtaining orders including work incidental to and in conjunction with the employee's own sales or solicitations. Work such as recruiting an employee for the client would not be considered part of the sales activity of the recruiter.

We hope that the above information will be of assistance to you. If you have further questions, you may wish to contact our Dallas Area Office, 1607 Main Street, Suite 200, Dallas 75201 (telephone: 767-6294). That office is in a better position to obtain all the necessary facts, and would be pleased to be of all possible assistance.

Sincerely,

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Administrator Assistant Administrator

William M. Otter  
Wage and Hour Division

Enclosure