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

FLSA2006-27

July 24, 2006

Dear **Name***:

This is in response to your request for an opinion concerning the applicability of the administrative and professional exemptions under Fair Labor Standards Act (FLSA) section 13(a)(1) (copy enclosed) to your position as Senior Legal Analyst for a corporation. Based on the information provided, it is our opinion that the Senior Legal Analyst position does not qualify for the administrative or professional exemption under FLSA section 13(a)(1).

You state that, in addition to a two-year legal studies degree, you have eight years of experience in legal research and analysis. In describing your duties, you state that ninety percent of your responsibilities include analyzing facts, identifying the legal issues involved, and then providing your interpretation of the law in a memorandum format for the attorney's review. You usually receive your assignments from attorneys by e-mail or phone, and you usually respond by e-mail. You are not always aware of what is done with your responses. Ten percent of your time is spent reviewing new materials, analyzing costs of current resources used in the department, drafting plans for cost savings for the department, training various personnel on the use of legal resources and legal research in general, as well as performing other miscellaneous tasks as needed. While an attorney you work with may suggest a deadline, you state that you work very independently and prioritize your assignments accordingly.

FLSA section 13(a)(1) provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity as those terms are defined in the final rules at 29 C.F.R. Part 541 that took effect on August 23, 2004 (copy enclosed). Our response is applicable under the final rule. We assume, for discussion purposes, that you satisfy the salary level and salary basis requirements under sections 541.600 and 541.602.

The term "employee employed in a bona fide administrative capacity" is defined as "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.

29 C.F.R. § 541.200(a).

The phrase 'directly related to the management or general business operations' refers to the type of work performed by the employee. To meet this requirement, an employee 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).

> Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

29 C.F.R. § 541.201(b).

Additionally,

> [a]n employee may qualify for the administrative exemption if the employee's primary duty is the performance of 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).

As discussed in § 541.202(a),

> [t]o qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

Furthermore, as noted in § 541.202(b),

> [t]he phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; 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; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

As explained in the preamble to the final rule, 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. 22,122, 22,143 (Apr. 23, 2004) (copy enclosed). In addition, § 541.202(e) states that "[t]he exercise of discretion and independent judgment in matters of significance must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources."

Based on the information you provided, we do not believe that your duties and responsibilities as a Senior Legal Analyst meet the "discretion and independent judgment in matters of significance" requirement. Typically, you draft particular documents to assist attorneys on a particular case or matter. It appears that your duties and responsibilities as a Senior Legal Analyst are performed through the use of particular skills and knowledge in researching and preparing reports, and that it is the attorneys who exercise discretion and independent judgment because they receive and decide whether or how to act on the information in your reports.

Although you state that you work independently and use your own judgment as to how to prioritize your work assignments, including how the projects will be executed and how much to time to spend on each assignment, it is not sufficient that an employee makes decisions regarding relatively insignificant matters, such as "when and where to do different tasks, as well as the manner in which to perform them." *Clark v. J.M. Benson Co., Inc.*, 789 F.2d 282, 287-88 (4th Cir. 1986). Nor is it sufficient that an employee makes limited decisions, within clearly "prescribed parameters." *See Dalheim v. KDFW-TV*, 706 F. Supp. 493, 509 (N.D. Tex. 1998), *aff'd*, 918 F.2d 1220 (5th Cir. 1990). Rather, there must be the exercise of discretion and independent judgment on matters of significance or consequence related to the management or general business operations of the employer or the employer's customers. For instance, as a Senior Legal Analyst, you do not formulate or implement management policies, utilize authority to waive or deviate from established policies, provide expert advice, or plan business objectives in accordance with the dictates of § 541.202(b). In addition, most jurisdictions have strict prohibitions against the unauthorized practice of law by laypersons. Under the American Bar Association's Code of Professional Responsibility, a delegation of legal tasks to a lay person is proper only if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work produced. The implication of such strictures is that paralegal employees would not have the amount of authority to exercise independent judgments with regard to legal matters necessary to bring them within the administrative exemption. Therefore, based on a review of the

information you provided, it is our opinion that your position as a Senior Legal Analyst does not qualify for the administrative exemption under FLSA section 13(a)(1). *See* Wage and Hour Opinion Letter December 16, 2005 (copy enclosed).

It has long been the position of the Wage and Hour Division that the duties of paralegal employees and legal assistants generally do not involve the exercise of discretion and independent judgment of the type required by the administrative exemption. The article you enclosed with your letter refers to numerous opinion letters in this regard. *See, e.g.*, Wage and Hour Opinion Letters March 20, 1998; April 13, 1995; and February 10, 1978.

With respect to the professional exemption, the term "employee employed in a bona fide professional capacity" is defined as:

> 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 work: (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

29 C.F.R. § 541.300(a).

Under § 541.301(a), the primary duty test under the learned professional exemption includes three elements: "(1) The employee must perform work requiring advanced knowledge; (2) The advanced knowledge must be in a field of science or learning; and (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction." Section 541.301(b) states that "[t]he phrase 'work requiring advanced knowledge' means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work."

As noted under § 541.301(c),

> [t]he phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

As indicated in § 541.301(d), "[t]he phrase 'customarily acquired by a prolonged course of specialized intellectual instruction' restricts the exemption to professions where specialized academic training is *a standard prerequisite for entrance into the profession*. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree." (Emphasis added.) Conversely, § 541.301(d) further clarifies that

> the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in *any* field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. (Emphasis added.)

Finally, as noted in § 541.301(e)(7),

> [p]aralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

Therefore, unless you possess an advanced specialized degree in another professional field, that degree is a standard prerequisite for entry into that field, and you apply advanced knowledge in that field in the performance of your paralegal duties, your position as a Senior Legal Analyst cannot qualify for the professional exemption under FLSA section 13(a)(1). *See* Wage and Hour Opinion Letter January 7, 2005 (copy enclosed).

As the preamble to the final rule noted, the Department considered comments urging the Department to declare that paralegals are exempt learned professionals. *See* 69 Fed. Reg. at 22,154-155 (Apr. 23, 2004) (copies enclosed). However, "none of the commenters provided any information to demonstrate that the educational requirement for paralegals is greater than a two-year associate degree from a community college or equivalent institution." *Id.* at 22154. Furthermore, there has been "no evidence in the record that a four-year specialized paralegal degree is a standard prerequisite for entry into the occupation." *Id.* Again, the Department's longstanding position is that paralegals and legal assistants do not qualify for the learned professional exemption, a position consistently endorsed in the opinion letters cited in the article you attached to your letter. *See*, *e.g.*, Wage and Hour Opinion Letters March 20, 1998; August 18, 1986; and September 27, 1979.

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,

Alfred B. Robinson, Jr.
Acting Administrator

Note: *The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).