

FEB - 7 1997

Dear

This is in response to your request for an opinion as to the application of the professional exemption from minimum wages and overtime provided by Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. 201, 213(a)(1) ("FLSA") to a group of employees of one of your clients. Your client produces scientific products such as fetal bovine serum, cell culture media, enzymes, chemical "markers and ladders" for working with DNA, reagents, and other biological supplies. You state that these products are used by scientists to analyze and map DNA structure for various organisms, up to and including human beings.

The employees in question are sales representatives who sell primarily by telephone the products produced by your client. You state that the sales work requires a sophisticated understanding of the science involved in working with the materials produced by your client. The employees in question also provide technical advice to customers based on the nature of the customer's scientific research as it relates to the nature of the products produced by your client. You indicate that the employer requires all of these employees to have obtained at least a bachelor degree in biology or related knowledge of cell culture and molecular biology, and you indicate that approximately 40% of these employees have advanced degrees. Finally, you indicate that the employee are paid a salary in excess of \$250 dollars a week. On the basis of the preceding, you believe that the employees are subject to the Section 13(a)(1) exemption for the learned professions.

Section 13(a)(1) of the FLSA provides a 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 Regulations, 29 C.F.R. Part 541. The regulatory requirements for the professional exemption are provided at 29 C.F.R. 541.3. Included in the conditions for the learned professions exemption is the requirement that the employee for whom the exemption is sought perform work requiring the consistent exercise of discretion and judgment in its performance. 29 C.F.R. 541.3(b).

The employees in question would seem to require knowledge and understanding of scientific principles and processes in order to understand the nature of their employer's product so as to be able to sell it. With that information they have the ability to

sell their employer's products. But we do not view this knowledge and understanding necessary for a sales position as being equivalent to the consistent exercise of discretion and judgment in the performance of day-to-day duties, as required by the regulations.

There very well may be other employees of the company who make decisions concerning the processes, tests and procedures necessary to produce the employer's products on a consistently successful basis. And in making these decisions these employees may exercise discretion and judgment on a day-to-day basis. But we view the making of these decisions, and the exercise of discretion and judgment which such decision making might require, as distinct from the knowledge and use of the results of these decisions by the sales employees in selling the employer's product. There is no indication that the employees in question participate in any processes which require the exercise of discretion and judgment. It is possible for the sales personnel about whom you have inquired to have obtained a great deal of knowledge about their employer's products without consistently exercising the type of discretion and judgment contemplated by the professional exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which 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 different conclusion than the one expressed herein. This opinion is also provided on the basis that it is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with the provisions of the FLSA.

I trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney  
Office of Enforcement Policy  
Fair Labor Standards Team