



SEP 12 1997

This is in response to your request for an opinion as to possible application to employees of your client, of the exemption from minimum wage and overtime requirements in Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. 201, 213(a)(1) ("FLSA"). In particular, you ask about the application of the administrative exemption, as defined in the Secretary of Labor's regulations at 29 C.F.R. 541.2.

The employees in question are classified as "investigator", and their duties generally involve background investigations of various types of employees such as executives, contract employees, law enforcement employees, astronauts, and others. The investigators conduct interviews and obtain information from various other sources in order to develop the pertinent facts concerning the character, habits, fitness, suitability, qualifications and other matters which may affect the subject's fitness for employment. Upon the completion of an investigation, an investigator compiles the information which was gathered in a written report.¹

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, professional, or outside sales capacity as those terms are defined in the Regulations at 29 C.F.R. Part 541. In order to qualify for exemption under Section 13(a)(1), an employee must meet all of the pertinent tests relating to duties, responsibilities, and salary as discussed in appropriate sections of the regulations. A determination of the exempt or nonexempt status of an employee must be made on an individual basis

¹ This opinion is based upon the facts as set forth in your request.

that takes into account all of the pertinent facts relating to the actual work performed by the employee in question. An employer claiming that an employee is exempt from the FLSA under Section 13(a)(1) bears the burden of proving that all of the requirements for exemption are met in a particular case.

An employee may qualify for exemption as a bona fide administrative employee if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.2 of the regulations, are met. Pursuant to section 541.2(e)(2), an employee who is paid on a salary or fee basis of at least \$250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or nonmanual work "directly related to management policies or general business operations" of the employer or the employer's customers, and the employee's work requires the exercise of discretion and independent judgment.

In determining whether activities are "directly related to management policies or general business operations" of the employer, two factors must be assessed. First, it is important to distinguish between those types of activities related to the administrative or staff operations of a business and "production" or line activities. Second, in addition to describing the types of activities, this phrase limits the exemption to "persons who perform work of substantial importance to the management or operation of the business" of the employer or of the employer's customers. 29 C.F.R. 541.205(a).

With regard to these inquiries, there is a distinction between "those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." Dalheim v. KDFW-TV, 918 F.2d 1220, 1230 (5th Cir. 1990); Reich v. Chicago Title Ins. Co., 853 F. Supp. 1325, 1330 (D. Kan. 1994). In other words, the test is whether the employees are engaged in carrying out the employer's day-to-day affairs rather than running the business itself or determining its overall course and policies. Bratt v. County of L.A., 912 F.2d 1066, 1070 (9th Cir. 1990). For example, employees "servicing" the business itself by advising management officials, planning, negotiating, representing the company or doing business research may be exempt administrative employees where their work is of substantial importance to the management or operation of the business. 29 C.F.R. 541.205(b). While the regulations provide that "servicing" a business may be

administrative, "advising the management" as used in the regulations is directed at advice on matters that involve policy determinations, i.e., how a business should be run or run more efficiently, not merely providing information in the course of the customer's daily business operation. Bratt, 912 F.2d at 1070. In general, then, "administrative employee" refers to a person who is engaged in important staff functions of the employer or the employer's clients or customers as opposed to the production functions.

In applying these general principles, the courts frequently have concluded that the primary function of investigators is to conduct or produce investigations for their investigative agencies or customers and, therefore, the administrative exemption does not apply. For example, in Reich v. State of New York, 3 F.3d 581 (2d Cir. 1993), cert. denied, 114 S. Ct. 1187 (1994), the court examined whether criminal investigators were subject to the exemption. The court concluded that they were not exempt because the Bureau of Criminal Investigation is in the law enforcement "business" and the investigators' primary duty was to conduct or produce criminal investigations. Similarly, in Gusdanovich v. Business Information Company, 705 F. Supp. 262 (W.D. Pa. 1985), the company was in the business of investigating and collecting information for insurance companies, businesses and individuals. The court concluded that an investigator for the company had as his primary duty the gathering of that information or product, and thus he was engaged in production activities. See also Harris v. District of Columbia, 741 F. Supp. 254, 262-63 (D.D.C. 1990) (housing inspectors not exempt); Roney v. United States, 790 F. Supp. 23 (D.D.C. 1992) (Deputy U.S. Marshal (i.e., "Criminal Investigator") not exempt). Cf. Adams v. United States, 27 Fed. Cl. 5 (1992) (applying OFM regulations, court states that the exempt status of criminal investigators employed by various Federal agencies depends on duties of particular jobs).

In addition, the Administrator has concluded that police officers of a municipality who had "primary responsibility for all aspects of the investigation of major crimes" are production workers of the agency and therefore cannot qualify for the administrative exemption. Op. Ltr. No. WH-529 (Feb. 1, 1988). See also Opinion Letter of Dec. 6, 1988 (state criminal investigators); June 9, 1988 (assistant sheriff, D.A. investigator); and July 8, 1988 (state criminal investigators). Because the inquiry is, by its nature, fact-intensive, the Department's application of the test does not always lead to classifying law enforcement personnel as "production" workers. See Op. Ltr. No. WH-292 (Oct. 8, 1974) (concluding on unspecified facts that certain

public defender investigators and deputy probation officers were administrative employees, but noting "questionable" status of similar but more junior employees).

Inasmuch as the firm that you have asked about has the conduct of investigations as its business function - the product it exists to produce - the specific investigation activities performed by the employees would appear to be more related to the ongoing day-to-day production operations of the firm than to management policies or general business operations of the firm.

Even if the investigators were viewed as performing staff operations of the firm's customers, they must perform work of "substantial importance to the management or operation of the business" of the customer in order to qualify for the exemption. For example, tax consultants ordinarily perform work at a responsible level and their work is of substantial importance to an employer's overall management policies or general business operations. However, a bank teller, bookkeeper, or accounting clerk typically does not perform work at such a level. 29 C.F.R. 541.205(c). Even where an employee's job is "indispensable," that is not sufficient to satisfy the substantial importance requirement. Dalheim, 912 F.2d at 1231; Clark v. J.M. Benson Co., Inc., 789 F.2d 282, 287 (4th Cir. 1986). It is the nature of the work performed by an individual that is critical to this test, and that work must "substantially affect[] the structure of an employer's [or its customer's] business operations and management policies." Martin v. Cooper Electric Supply Co., 940 F.2d 896, 906 (3d Cir. 1991) (emphasis in original). See Bratt 912 F.2d at 1070. Based upon the information you have provided, we believe that the work of the investigators is not of substantial importance to the overall management or operation of the firm's customers, because their work does not help shape or define the policies or operations of those agencies or affect their operations to a substantial degree.

Finally, it is our view that most of the work of investigators typically involves the use of skills and the application of known standards or established procedures, as distinguished from work requiring the exercise of discretion and independent judgment as required by section 541.207 of the regulations. The materials you provided do not demonstrate that the investigators evaluate alternative courses of conduct and have the authority to make independent choices, free from immediate direction or supervision, with respect to matters of significance and consequence. 29 C.F.R. 541.207(a), (d)(1). It is not sufficient that an employee makes decisions regarding "when

and where to do different tasks, as well as the manner in which to perform them." Clark, 709 F.2d at 207-08. Nor is it sufficient that an employee may make limited decisions, within clearly "prescribed parameters." Dalheim v. KDFW-TV, 706 F. Supp. 493, 509 (N.D. Tex. 1988), aff'd, 910 F.2d 1220 (5th Cir. 1990). Rather, there must be true discretion and independent judgment on matters of significance or consequence. Therefore, based upon the information that you have provided, it is our opinion that the employees employed as investigators cannot qualify as bona fide administrative employees under 29 C.F.R. 541.2.

In a letter supplementing your opinion request you have provided a ruling by the Office of Personnel Management and Department of the Navy that found that federal investigators qualified for the administrative exemption. Since we are not aware of all the facts upon which that ruling was based, we do not find it dispositive.

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.

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

Sincerely,



John R. Fraser
Acting Administrator