

SEP 12 1997

This responds to your letter of November 25, 1996, concerning whether the minimum wage and overtime exemption contained in section 13(a)(1) of the Fair Labor Standards Act (FLSA) is applicable to five classifications of employees employed by the

The FLSA is the Federal law of most general application concerning wages and hours of work. An employee who is covered under this law and not otherwise exempt must be paid a minimum wage of not less than \$5.15 an hour for all hours worked and not less than one and one-half times his regular rate of pay for all hours worked in excess of 40 in a workweek.

Section 13(a)(1) of the FLSA 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 Regulations at 29 C.F.R. Part 541. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the regulations, are met. One such test provides that an employee who is paid on a salary or fee basis at a rate of at least \$250 a week exclusive of board, lodging or other facilities is exempt if regularly directing the work of two or more full time employees, or the equivalent, and if the employee's primary duty consists of management of the enterprise or a recognized subdivision thereof. This test is also termed the "upset salary" or "short test" (29 C.F.R. 541.1(f)).

Although you do not state the salary of the employees involved, we assume it to be more than \$250. Therefore, we must determine whether the employees regularly direct the work of at least two employees and whether their primary duties consist of management. A determination of whether an employee has management as their primary duty must be based on all the facts in a particular case. In the ordinary case, it may be taken as a rule of thumb that primary duty means the major part, or over 50 percent of the employee's time. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in management duties, the employee nevertheless might have management as the primary duty if the other pertinent

factors support such a conclusion.

Lead Court Clerk

The Lead Court Clerk regularly directs the work of five to seven employees and therefore meets the first criterion of the short test. With respect to the second or "primary duty" criterion, you indicate that there is an even 50-50 split on the amount of time spent in performing management and the amount of time spent performing duties similar to those of the employees supervised.

According to your letter and the attached job description, the Lead Court Clerk performs the following duties which are managerial in nature: direct supervision of five to seven employees, providing training, assigning and reviewing work, writing performance evaluations, approving leave requests, recommending disciplinary actions and coordinating with other departments. See 29 C.F.R. 541.102(b). This employee also regularly exercises discretion and independent judgment in the performance of job duties and is under minimal supervision. Assuming the facts as stated in your letter and the attached job specification, we would consider this employee to be an exempt executive employee.

Supervising Deputy Clerk

The Supervising Deputy Clerk regularly directs the work of ten employees and therefore meets the first criterion of the short test. With respect to the second or "primary duty" criterion, you indicate that there is an even 50-50 split on the amount of time spent in performing management and the amount of time spent performing duties similar to those of the employees supervised.

According to your letter and the attached job description, the Supervising Deputy Clerk performs the following duties which are managerial in nature: direct supervision of ten employees, interviewing, selecting and training employees, assigning and reviewing work, writing performance evaluations, approving of leave requests, and recommending promotions and disciplinary actions. See 29 C.F.R. 541.102(b). This employee also regularly exercises discretion and independent judgment in the performance of job duties and is under minimal supervision. Assuming the facts as stated in your letter and the attached job specification, we would consider this employee to be an exempt executive employee.

Jury Commissioner and Probate Commissioner

The Jury Commissioner and the Probate Commissioner do not qualify for the executive exemption because they do not supervise two or more full time employees, or the equivalent. There remains the question whether they can qualify for exemption as "administrative employees". 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. Thus, the exemption applies to employees engaged in administrative operations as opposed to "production", but only where the employees perform work of substantial importance to the management or operation of the business. See 29 C.F.R. 541.205(a).

The Jury Commissioner coordinates the organization, staffing and operational activities of the Jury Office, participates in the development of policy for the Jury Office, participates in the development of the budget, and coordinates with other divisions and outside agencies. In addition, the Jury Commissioner supervises one employee, including training, writing performance evaluations, directing and reviewing the employee's work, recommending promotional and disciplinary actions, and approving leave requests. The Jury Commissioner regularly exercises discretion and independent judgment.

The Probate Commissioner participates in the development and implementation of goals and policies for the Probate Division, forecasts additional funds needed by the office, identifies opportunities for improving service delivery methods and procedures, and coordinates assigned services with those of other divisions. In addition, the Probate Commissioner supervises one employee, including training, writing performance evaluations, directing and reviewing the employee's work, recommending promotional and disciplinary actions, and approving leave requests. The Probate Commissioner regularly exercises discretion and independent judgment in the performance of job duties and is under minimal supervision.

Assuming the facts as stated in your letter and the attached job specification, we would consider both the Jury Commissioner and the Probate Commissioner to be exempt administrative employees because their work appears to be of substantial importance to the operation of the district court itself, and they are directly involved in developing goals and policies for their divisions.

Judge's Administrative Assistant

Section 3(e)(2)(C) excludes from the coverage of the FLSA an individual who is not subject to the civil service laws of the State, political subdivision, or agency which employs him or her, and who holds a public elective office of that State, subdivision, or agency, (2) is selected by the holder of such an office to be a member of his or her personal staff, (3) is appointed by such an office holder to serve on a policy making level, or (4) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his or her office.

As indicated in Section 553.11 of the Regulations, 29 C.F.R. Part 553, the term "member of personal staff" generally includes only persons who are under the direct supervision of a selecting elected official and have regular contact with such official. According to your letter, the Judge's Administrative Assistant works directly for the elected judge and is an at-will employee. Therefore, this employee is excluded from coverage by the FLSA pursuant to the personal staff exception.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your 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 request might require a different conclusion than the one expressed herein.

I trust that this satisfactorily responds to your inquiry.

Sincerely,

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