



FLSA2006-30

September 8, 2006

Dear **Name***:

This is in response to your request for an opinion concerning whether Loss Prevention Managers (LPMs) employed by your client, a large retail business operating over 200 department stores, qualify for the administrative exemption under Fair Labor Standards Act (FLSA) section 13(a)(1) (copy enclosed). Based on a review of the information provided, it is our opinion that LPMs qualify for the administrative exemption.

You state that the primary function of an LPM is the effective implementation of a loss prevention and shortage control program for the store where the LPM is employed. The effective implementation of a loss prevention and shortage control program is an essential ingredient for the profitability of your client's retail stores. This is a significant matter that frequently determines the success or failure of a store. In this capacity, the LPM is the primary communicator between the store and the Regional Loss Prevention Manager on specific issues and concerns, and serves as the co-chair of the store's Loss Prevention and Safety Committee. As co-chair of this committee, the LPM ensures training standards for associates regarding emergency procedures, robbery, fire, etc. The LPM reports directly to the Store Manager and the Regional Loss Prevention Manager, and provides both with current reports and information.

The LPM utilizes company programs and also develops complementary store-specific programs to meet or exceed the store's shortage goals. In developing the Store Shortage Reduction Action Plan, the LPM analyzes inventory shortage results, allocates store Loss Prevention resources to successfully reduce inventory shortage, focuses prevention activities on high shortage departments, identifies paperwork control weaknesses and implements procedures to correct them, conducts audits for compliance and ensures store follow up on price accuracy initiatives, and sells/partners with store management to implement the plan. The LPM investigates the causes of inventory shortage (*e.g.*, complex "paperwork" problem or theft) and then selects appropriate steps to solve the problem. Once the appropriate course of action is selected, the LPM pursues that course of action to a successful completion. In developing cash shortage controls and programs to manage and reduce loss, the LPM develops an appropriate training and awareness program to reduce error, reviews cash discrepancies to keep store within allowable guidelines, and identifies cash registers with unacceptable shortages. Also, the LPM regularly reviews loss prevention exception reports for signs of dishonesty.

Depending on the size of the store, its history, and other factors, an LPM may supervise one or more Loss Prevention Associates (LPAs).¹ The LPM guides the store management and LPAs in conducting investigations, training, and addressing shortage related issues. In providing direction for LPAs, the LPM interviews all LPA candidates and conducts and supervises

¹ Notwithstanding the LPM's supervisory authority, you asked, for purposes of this opinion request, that we address only the applicability of the administrative exemption.

training for LPAs on a continual basis. In developing store associate awareness and support programs, the LPM promotes customer approach programs and ensures that all associates receive loss prevention awareness training, including the distribution of associate awareness material. One aspect of these programs deals with how to approach customers in a way that is legal and appropriate. In ensuring that programs to prevent and detect internal theft are followed, the LPM, in consultation with management, determines what internal investigations to pursue and when to conduct interviews, and ascertains prosecutable cases. Also, the LPM must be proficient in covert camera installation and the operation of photographic and video equipment. The LPM is responsible for taking appropriate legal steps with respect to shoplifters, including apprehensions of suspects and the filing of police reports, but this duty arises on average once or twice per week. In this regard, LPMs are directed to focus their efforts on deterrence, training, and associate awareness. The LPM also has responsibilities, in conjunction with the human resources department, for the prompt and thorough investigation of harassment allegations. With respect to all of the above job functions, the LPM consults with and provides expert advice to store management. The LPM works in an independent manner and his or her typical work day consists of performing office or non-manual work. The LPM is paid in excess of \$455 per week on a salary basis.

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 29 C.F.R. Part 541. An employee may qualify for exemption if all of the pertinent tests relating to duties and salary are met. Please note that revisions to 29 C.F.R. Part 541 were published as a final rule in the Federal Register on April 23, 2004 (69 Fed. Reg. 22,122) and became effective on August 23, 2004 (copy enclosed).

As stated in 29 C.F.R. § 541.200(a), the term “employee employed in a bona fide administrative capacity” means “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.

In the context of the administrative exemption,

[t]he 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).

To 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.

29 C.F.R. § 541.202(a).

The 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.

29 C.F.R. § 541.202(b). Section 541.202(c) further notes that "[t]he exercise of discretion and independent judgment implies that the employee has the authority to make an independent choice, free from immediate direction or supervision." As the preamble to the final rule explained, 69 Fed. Reg. 22,143 (Apr. 23, 2004) (copy enclosed), federal courts generally find that employees who meet at least two or three of the indicators mentioned in 29 C.F.R. § 541.202(b) are exercising discretion and independent judgment, although a case-by-case analysis is required.

The administrative exemption thus has requirements pertaining both to the “type of work performed” and to “the level of importance or consequence of the work performed.” 69 Fed. Reg. 22,139 (copy enclosed). With regard to the type of work performed, the preamble explains that “the administrative exemption covers only employees performing a particular type of work—work related to assisting with the running or servicing of the business.” *See* 69 Fed. Reg. 22,141. Furthermore:

[T]his exemption is intended to be limited to those employees whose duties relate “to the administrative as distinguished from the ‘production’ operations of a business.” Thus, it relates to employees whose work involves servicing the business itself—employees who “can be described as staff rather than line employees, or as functional rather than departmental heads.”

Id. Although the production versus staff dichotomy is illustrative, rather than dispositive, “it is still a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption.” *Id.*

Based on a review of the information provided, we believe that the LPM’s primary duty of effectively implementing a loss prevention and shortage control program by, among other duties, analyzing inventory results, allocating store Loss Prevention resources to successfully reduce inventory shortage, focusing prevention activities on high shortage departments, identifying paperwork control weaknesses and implementing procedures to correct them, conducting audits for compliance and ensuring store follow-up on price accuracy initiatives, reviewing cash discrepancies to keep the store within allowable guidelines, identifying cash registers with unacceptable shortages, and regularly reviewing loss prevention exception reports for signs of dishonesty directly relates to the functional areas of accounting, auditing, and quality control discussed in 29 C.F.R. § 541.201(b). *See* 69 Fed. Reg. 22,140-22,142. The duties performed by the LPM such as interviewing all loss prevention candidates, conducting and supervising training for LPAs on a continual basis, and providing direction for LPAs also directly relate to the functional areas of personnel management and human resources. By ensuring training standards for associates regarding emergency procedures, robbery, fire, etc., as co-chair of the store’s Loss Prevention and Safety Committee, the LPM performs work that is directly related to the functional area of safety and health. Furthermore, as described above, the LPM’s typical work day consists of performing office or non-manual work. Therefore, the LPM’s primary duty involves the “performance of office or non-manual work directly related to the management or general business operations of the employer.” 29 C.F.R. § 541.200(a)(2). *See* Wage and Hour Opinion Letter September 20, 1982 (copy enclosed).

Moreover, we believe that the LPM’s primary duty “includes the exercise of discretion and independent judgment with respect to matters of significance.” 29 C.F.R. § 541.200(a)(3). Working independently shows that the LPM has certain decision-making authority that is “free from immediate direction or supervision.” 29 C.F.R. § 541.202(c). In selecting appropriate steps to address the problem of inventory shortage and pursuing the selected course of action, the LPM compares and evaluates possible courses of conduct, and acts or makes a decision after the various possibilities have been considered as discussed in 29 C.F.R. § 541.202(a). The

LPM's primary duty of implementing the loss prevention and shortage control program for the store and, in certain situations, the LPM's supervisory responsibilities over one or more LPAs demonstrate that the employee "implement[s] management policies or operating practices." 29 C.F.R. § 541.202(b); *see also* 69 Fed. Reg. 22,142-22,144 (copies enclosed). In implementing the loss prevention and shortage control program for the store, the LPM "performs work that affects business operations to a substantial degree" because the effective performance of such duty is essential for the profitability of the store and, in fact, frequently determines the store's success or failure. 29 C.F.R. § 541.202(b). In developing complementary store-specific programs to meet or exceed the store's shortage goals, the LPM "carries out major assignments in conducting the operations of the business." *Id.* In determining what internal investigations to pursue and when to conduct interviews, in ascertaining prosecutable cases, and in investigating harassment allegations, the LPM "investigates and resolves matters of significance on behalf of management." *Id.* In addition, in consulting with and providing expert advice to store management with respect to the loss prevention and shortage control program, the LPM "provides consultation or expert advice to management." *Id.* Therefore, the LPM's duties meet several of the factors in 29 C.F.R. § 541.202(b) indicating the sufficient "exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(3). Based on this review, it is our opinion that LPMs qualify for the administrative exemption under FLSA section 13(a)(1).

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,

Paul DeCamp
Administrator

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